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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 14, Original

FORREST HOLIDAY, PETITIONER,

vs.

**JAMES A. JOHNSTON, WARDEN, UNITED STATES
PENITENTIARY, ALCATRAZ, CALIFORNIA**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED MARCH 2, 1941.

CERTIORARI GRANTED MARCH 2, 1941.

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[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTH-
ERN DIVISION**

No. 22940-L

FORREST HOLIDAY, Petitioner

vs.

JAMES A. JOHNSTON, Warden, U. S. Penitentiary, Alcatraz,
California

AMENDED PETITION FOR A WRIT OF HABEAS CORPUS—Filed
May 8, 1939

Upon leave of Court first obtained, the petitioner, Forrest Holiday files this his amended petition for a writ of habeas corpus, and respectfully represents and shows:

I

That your petitioner alleges that on or about the 27th day of May, 1936, in the Northeastern Division for the District of North Dakota, he was indicted under two counts charging violation of the laws of the United States; that, on or about the 13th day of October, 1936, in the United States District Court for the District of North Dakota, Northeastern Division, before the Honorable Andrew Miller, presiding therein, he was convicted under said indictment upon a plea of guilty to the offense as stated therein; that, thereupon, in pursuance of said conviction, he was sentenced to imprisonment for a period of ten (10) years on the first count of said indictment, charging a violation of Section 588 B (a) of Title 12 of U. S. C. A.; and sentenced to imprisonment for a period of fifteen (15) years on the second count of said said indictment, charging a violation of Section 588B (b) of Title 12 of U. S. C. A., said last mentioned sentence to commence at the expiration of the sentence on the first count; that he is now in prison in the United States Penitentiary at Alcatraz, California, in the custody of James A. Johnston, Warden of said Penitentiary, in execution of the said judgment of conviction and the sentences [fol. 2] thereunder; that the said judgment of conviction,

the sentences and imprisonment thereunder, are each and all contrary to the statutes and laws of the United States and the Constitution of the United States, in each of the following particulars, to-wit:

(a) That at no time in any of the above mentioned proceedings did your petitioner have the advice and assistance of counsel; that the trial court did not advise or inform him that he was entitled to counsel; that the petitioner did not know that he was entitled to or could have the advice or assistance of counsel in the absence of his ability to pay for the same; that because of the above premises the petitioner was not able to and did not make an intelligent or competent waiver of his constitutional right "to have the assistance of counsel for his defense."

(b) That your petitioner was indicted under two counts, and that he was convicted and sentenced for the violation of two offenses; that both counts were carried out of the same action and all under the same circumstances, and that the same evidence in this matter was necessary and was used in the trial and for the conviction on each of the two counts; that in law and in fact but one offense had been committed, with the result that your petitioner has been twice put in jeopardy for the same offense, contrary to the Constitution of the United States and the Amendments thereto.

That by reason of the premises aforesaid, your petitioner is unlawfully confined, imprisoned and restrained of his liberty.

II

That your petitioner files herewith, as Exhibit "A", copies of the files and documents of the United States District Court for the District of North Dakota, Northeastern Division, in the proceedings taken and had before the said Court and out of which proceedings your petitioner was [fol. 3] convicted, sentenced and imprisoned as aforesaid; that your petitioner expressly refers to said records, files, and documents and makes the same a part of this amended petition as if set forth in full herein.

Wherefore, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, commanding him to bring the

said petitioner into and before United States District Court for the Northern District of California, Southern Division, that he may be released from further unlawful custody.

Stephen M. White, Attorney for Petitioner.

Duly sworn to by Forrest Holiday. Jurat omitted in printing.

[fol. 4] EXHIBIT "A" TO AMENDED PETITION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF NORTH DAKOTA NORTHEASTERN DIVISION, DE-
CEMBER TERM 1935

Indictment

Charge: Violation of Section 588 B of Title 12 U. S. C. A.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES RONALD WHITE, EARL PHIPPS and JAMES THOMAS,
Defendants

The Grand Jurors of the United States of America, within and for the State and District of North Dakota, good and lawful men, duly selected, empaneled, charged and sworn, upon their oaths present:

That heretofore, to-wit: On or about the 27th day of May, 1936, at Maddock in the County of Benson, State and District of North Dakota, and within the jurisdiction of this Honorable Court, one Joseph Ronald White, one Earl Phipps and one James Thomas, whose true names other than as herein states are to the Grand Jurors unknown, and hereinafter in this indictment designated as the "defendants", did commit the offense of violating the provisions of Section 588 B of Title 12 United States Code Annotated, committed in the manner and form following, to-wit:

That at said time and place one C. I. Erstad, one Florence Hanson and one Fred Graber were officers and employees, to-wit: Cashier, Clerk and Assistant Cashier, respectively, of the Farmers State Bank of Maddock, North Dakota, which said bank was a banking corporation theretofore or-

ganized, and then and there existing, and in operation, and doing business, under and by virtue of the banking laws of the State of North Dakota, and at said time was an insured bank as defined in Sub-Section (C) of Section 12 B of the Federal Reserve Act; and each of said officers and said clerk of said Bank as such officers and such employee, had custody of the monies, funds and credits of said bank.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that at said time and place the [fol. 5] said defendants did then and there by force and violence and by putting in fear, wilfully, knowingly, unlawfully and feloniously take from the presence of the said C. I. Erstad, the said Fred Graber, officers of said bank aforesaid, and the said Florence Hanson, Clerk of said bank as aforesaid, a large amount of money, then and there belonging to and being in the care, custody, control, management and possession of said Farmers State Bank of Maddock, to-wit: approximately \$4088.00, lawful and current money of the United States, in nickels, dimes, quarters, half dollars, dollar bills, new five dollar bills, new ten dollar bills and new twenty dollar bills, a more particular description of which is to the Grand Jurors unknown.

This contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count Two

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: on or about the 27th day of May, 1936, at the place mentioned in the first count of this indictment and within the jurisdiction of this Honorable Court, the said defendants did commit the offense of violating the provisions of Section 588 B of Title 12 United States Code Annotated, committed in the manner and form following, to-wit:

That at said time one C. I. Erstad, one Florence Hanson and one Fred Graber were officers and employees, to-wit: Cashier, Clerk and Assistant Cashier, respectively, of the Farmer State Bank of Maddock, North Dakota; which said bank was a banking corporation theretofore organized and then and there existing and in operation, and doing business under and by virtue of the banking laws of the State of North Dakota, and was at said time an insured bank as

defined in sub-Section (c) of Section 12 B of the Federal [fol. 6] Reserve Act; and each of said officers and said Clerk of said bank, as such officers and such employee had custody of the monies, funds and credits of said bank.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that at same time and place the said defendants did then and there, wilfully, knowingly, unlawfully and feloniously by the use of a dangerous weapon, to-wit: an automatic pistol, in committing the offense described in the first count of this indictment, the description of which said offense in said count is incorporated into this count by reference as fully as if set out herein in detail; put in jeopardy the lives of the said C. I. Erstad, Fred Graber and Florence Hanson, they being then and there officers and clerk, respectively, in said bank as aforesaid, while they were in charge of the monies, funds and credits of said bank.

This contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

P. W. Lanier, United States Attorney.

Endorsed on the back as follows: "United States District Court, District of N. Dak. N. E. Division. The United States of America vs. Joseph Ronald White, Earl Phipps and James Thomas. Indictment a true bill, (Signed) D. B. Sproul, Foreman.

No. 6414. Filed Sep. 24, 1936, J. A. Montgomery, Clerk.

[fol. 7]

COMMITMENT

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
FOR THE DISTRICT OF NORTH DAKOTA SOUTHEASTERN DIVISION

The President of the United States of America:

To the Marshal of the United States of the — District of North Dakota and to the Warden of the United States Penitentiary at McNeil Island, Washington, Greeting:

Whereas, at the December Term of said Court, 1935, held at Fargo in said district and division, to wit, on October 13, 1936, Forrest Hoiday (true name), alias James Thomas was sentence- by said Court upon his plea of guilty to the

indictment to be committed to the Custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Penitentiary for and during the term and period of Ten (10) years upon the first Count of the Indictment and fifteen (15) years upon the second count of the Indictment—said sentences to run consecutively, beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prison- shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention for violation of

Section 588 B of Title 12 U. S. C. A., unlawfully by force and violence and by putting in fear, taking from the presence of the officers and clerk of the Farmers State Bank at Maddock, North Dakota, an insured Bank as defined in Subsection (c) of Section 12 B of the Federal Reserve Act, a large sum of money belonging to said bank as charged in the first count of the indictment, and unlawfully by the use of a dangerous weapon, to-wit: an automatic pistol, putting in jeopardy the lives of the said officers and clerk of said bank and taking from the presence of said officers and clerk a large sum of money belonging to said bank as charge- in the second Count of the Indictment.

And whereas, the Attorney General of the United States has designated the United States Penitentiary at McNeil Island, Washington as the place of confinement where the sentence of said Forrest Holiday (true name), alias James Thomas, shall be served;

Now, this is to command you, the said marshal, forthwith to take said Forrest Holiday (true name), alias James Thomas and him safely transport to said United States Penitentiary and Him there deliver to said Warden of said United States Penitentiary with a copy of this writ; and you, the said Warden, to receive said Forrest Holiday (true name), alias James Thomas and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

Witness the Honorable Andrew Miller, Judge of said Court, and the seal thereof, affixed at Fargo in said district, this 13th day of October, 1936.

J. A. Montgomery, Clerk. E. R. Steele, Deputy Clerk. (Seal.)

[fol. 8]

Return

I have executed the within writ in the manner following to-wit:

On October 13, 1936 I delivered said Forrest Holiday to the jailer of the Cass County Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on 22nd — 1936, I delivered said Forrest Holiday, alias James Thomas to the Warden of the United States Penitentiary at McNeil, Washington, together with a copy of this commitment.

(Signed) S. J. Doyle, United States Marshal.

Filed November 2, 1936.

J. A. Montgomery, Clerk.

Marshal's Docket No. 14028

UNITED STATES OF AMERICA,

District of North Dakota, ss:

I, J. A. Montgomery, Clerk of the District Court of the United States for the District of North Dakota, do hereby certify that I have carefully compared the foregoing copies with the originals thereof which are in my possession as such Clerk and that such copies are a correct transcript from the original.

Indictment against Joseph Ronald White, Earl Phipps and James Thomas, filed in my office on September 24th, 1936, and Commitment on Sentence imposed on Forrest Holiday, alias James Thomas, with Marshal's return thereon.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, At Fargo, in said District, this 31st day of October A. D., 1938.

J. A. Montgomery, Clerk, by Joan Geston, Deputy.
(Seal.)

[fol. 9] At a session of the District Court of the United States for the District of North Dakota, continued and held pursuant to adjournment, at the United States Court Room in the City of Fargo, in the 13th day of October, 1936, the Honorable Andrew Miller, Judge being present and presiding in said Court, the following among other proceedings were had and done, to-wit:

(6414)

UNITED STATES OF AMERICA, Plaintiff,

vs.

FORREST HOLIDAY (indicted under the name of James Thomas), Defendant.

ARRAIGNMENT, PLEA AND SENTENCE

Now comes the United States, by P. W. Lanier, United States Attorney, and the defendant, in the custody of the Marshal, and said defendant being duly arraigned upon the Indictment filed against him, answers that his true name is Forrest Holiday, whereupon it is ordered that all further proceedings be conducted under the defendants's true name as given, and now the defendant being called upon to plead to the indictment, charging him with unlawfully and feloniously robbing a bank insured under the Federal Reserve Act, and putting in jeopardy the lives of its employees, in violation of Section 588 B of Title 12 USCA, pleads that he is guilty of the offense as charged in the indictment.

Now the United States Attorney moves the Court for sentence upon the plea of guilty aforesaid under the first count of the indictment herein, and said defendant being called upon to show cause, if any he have, why sentence should not now be pronounced against him, and no cause being shown, and the premises being considered and fully understood by the Court, it is

Ordered, Adjudged, Decreed and Sentenced, that said defendant, Forrest Holiday, be imprisoned in a United States Penitentiary for and during a term of Ten Years, commencing at twelve o'clock noon of this day, at Fargo, North Dakota, and committed to the custody of the Attorney General of the United States, or his authorized representative, to carry this sentence into execution.

Now the United States Attorney moves the Court for sentence upon the second count of the indictment, under the plea of guilty aforesaid, and the defendant being called upon to show cause, if any he have, why sentence should not now be pronounced against him, and no cause being shown, and the premises being considered and fully understood by the Court, it is

Ordered, Adjudged, Decreed and Sentenced, that said defendant Forrest Holiday, be imprisoned in a United

States Penitentiary for and during a term of fifteen years, commencing at the expiration of the sentence imposes under count one of the Indictment, and committed to the custody of the Attorney General of the United States, or his authorized representative, to carry this sentence into execution.

THE UNITED STATES OF AMERICA,
District of North Dakota, ss:

I, J. A. Montgomery, Clerk of the District Court of the United States for the District of North Dakota, do hereby certify that the above and foregoing is a true copy of arraignment, plea and sentence entered upon the Journal of the proceedings of said Court, in the cause therein entitled; [fol. 10] that I have compared the same with the original entry of said arraignment, plea and sentence, and it is a true transcript therefrom, and the whole thereof.

Witness my Official Signature and the Seal of said Court at Fargo, in said District, this 31st day of October, 1938.

J. A. Montgomery, Clerk, by Joan Geston, Deputy.

[fol. 11] Good cause appearing therefore, leave is hereby granted to Forrest Holiday to file the attached amended petition for a writ of habeas corpus.

Dated this 6th day of May, 1939.

Harold Louderback, U. S. District Judge.

[File endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT FOR THE NORTH-
ERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

ORDER TO SHOW CAUSE—Filed June 29, 1939

To James A. Johnson, Warden, United States Penitentiary, Alcatraz, California, respondent herein:

It appearing that Forrest Holiday on May 6, 1939, filed in the above entitled Court his verified amended petition for a writ of habeas corpus;

Now, upon motion of Stephen M. White, Attorney for the said Forrest Holiday, the petitioner herein, and good cause appearing therefor,

You are hereby directed to appear before this Court on the 10th day of July, 1939, at the hour of 10 o'clock A. M. of said day, to show cause, if any you have, why a writ of habeas corpus should not be issued as prayed for in the petition for a writ of habeas corpus on file herein, and

It is hereby ordered that you, or whoever is acting under your orders or the orders of the Attorney General of the United States, retain the custody of the said Forrest Holiday within the jurisdiction of this Court until its further order herein, and

It is further ordered hereby that a copy of this order be [fol. 13] served upon you and upon the United States Attorney for this District, your representative herein.

Dated at San Francisco, California, this 29th day of June, 1939.

(Signed) Harold Louderback, United States District Judge.

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO ORDER TO SHOW CAUSE—Filed July 10, 1939

Now comes James A. Johnston, Warden of the United States Penitentiary at Alcatraz Island, California, and for cause why a writ of habeas corpus should not issue herein shows as follows:

I

That the person hereinafter called "the prisoner", on whose behalf the petition for writ of habeas corpus was filed, is detained by your respondent James A. Johnston as Warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the Judgment and Sentence, and Order and Warrant of Commitment duly and regularly issued in Criminal Cause Number 6414 on the 13th day of October, 1936, by the United States District Court for the District of North Dakota, and transfer order [fol. 15] issued at Washington, D. C. by the Bureau of

Prisons of the Department of Justice, in the case of said Forrest Holiday;

II

That filed herewith and incorporated herein as though fully set forth and as Respondent's Exhibit "A" are the following:

- (1) Certified copies of the indictment, judgment and sentence and commitment in said criminal cause No. 6414;
- (2) Certified copy of the docket entries in said criminal cause No. 6414;
- (3) Copy of the transfer order issued as aforesaid;
- (4) Record of Court Commitment of the United States Penitentiary at Alcatraz, California, pertaining to Forrest Holiday;
- (5) Certificate of Honorable Andrew Miller, Judge of the District Court of the United States for the Northern District of California;
- (6) Affidavit of Deputy United States Marshal Angus Kennedy;

Wherefore, respondent prays that the petition for writ of habeas corpus be dismissed.

Dated: This 30th day of June, 1939.

James A. Johnston, Warden, United States Penitentiary at Alcatraz Island, California.

[fols. 16-18] EXHIBIT "A" TO RETURN

Indictment omitted. Printed side page 4 ante

[fols. 19-21] Commitment omitted. Printed side page 7 ante

[fol. 22] Arraignment, plea and sentence omitted. Printed side page 9 ante.

[fol. 23] DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NORTH DAKOTA

DOCKET ENTRIES

I, Beatrice A. McMichael, Clerk of the United States District Court for the District of North Dakota, do hereby

certify that the following is a correct copy of the docket entries in my office, found in Criminal Docket, Volume "M", No. 6414, in the case of United States of America vs. James Thomas:

Sept. 24, 1936—Entered report of Grand Jury.
 " " " —Filed indictment.
 " " " —Entered order for bench warrant and issued bench warrant.
 " " " —Entered bond order and certified copy thereof.
 " " " —Filed certificate of Foreman of Grand Jury.
 " " " —Filed warrant returned not found.
 " " " —Entered order for certified copy of indictment for use in apprehending the defendant in the Western District of Missouri.
 " " " —Certified copy of indictment, bench warrant and Non Est Return given U. S. Attorney.
 Oct. 10, 1936—Filed U. S. Commissioner's Transcript.
 " " " —Filed Warrant on Removal.
 " " " —Issued bench warrant.
 " 13 " —Filed warrant returned.
 " " " —Entered arraignment, plea of guilty, and sentence. Defendant pleads that his true name is Forest Holiday and records are changed to conform thereto. Sentence imposed of ten years on first count, and fifteen years on second count, to run consecutively.
 " " " —Final commitment and certified copy.
 Nov. 2 " —Filed commitment returned.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Fargo, in said District, this 22nd day of May, A. D. 1939.

Beatrice A. McMichael, Clerk. (Seal.)

[fol. 24]

TRANSFER ORDER

Department of Justice, Washington

August 30, 1937.

(Seal)

To the Warden, U. S. Penitentiary, McNeil Island, Washington.

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney

General by the Director of the Bureau of Prisons has ordered the transfer of Forrest Holiday, No. 12392, from the U. S. Penitentiary, McNeil Island, Wash., to the U. S. Penitentiary, Alcatraz Island, Calif.

Now therefore, you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official in charge of the institution in which the prisoner is now confined, are hereby authorized to deliver the prisoner in accordance with the above order; and you, the warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him to safely keep until the expiration of his sentence or until he is otherwise discharged according to law.

By direction of the Attorney General, (S) Frank
Loveland, Acting asst. Director, Bureau of Prisons,
———, Safer custody.

A True Copy:

W. F. Dorington, Record Clerk, U. S. P., Alcatraz,
Calif.

Original.—To be left at institution to which prisoner is transferred.

(Here follow 2 photolithographs, side folios 25-25½.)

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AUTHORIZATION FOR DISPOSITION OF MAIL & PROPERTY

I hereby authorize the _____

(Warden or Superintendent)

_____ of the _____

(Institution)

_____ or his authorized representative, to open and examine all mail matter and express or other packages which may be directed to my address, and to sign my name as endorsement on all checks, money orders, or bank drafts, for deposit to my credit in the Prisoners' Trust Fund, as long as I am a prisoner in said institution.

In the event that I should die, I direct that my _____ be notified and that all of my personal effects, including any money remaining to my credit in or due me from said _____

(Institution)

_____, be immediately transmitted to _____ whose address is _____

Dated at the _____

_____ day of _____

_____, 19____

_____, this

(Name and Number)

I hereby certify that the above and foregoing was read and fully explained by me to the above-named prisoner before he signed the same, and that he signed the same voluntarily in my presence, this _____ day of _____, 19____

Record Clerk

FPI INC.-FLK-1.9-32-60000-13162-1

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[fol. 26] IN UNITED STATES DISTRICT COURT FOR THE NORTH-
ERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

• CERTIFICATE OF HON. ANDREW MILLER

I, Andrew Miller, Judge of the District Court of the United States for the District of North Dakota do hereby certify that I have been the United States District Judge for the District of North Dakota for the last seventeen years; that it has always been my uniform practice to inquire of defendants appearing before me, without counsel, charged with the commission of felonies, whether or, not they desired counsel, and if so to offer to appoint counsel; that sentence in the case of United States v. Forrest Holiday was imposed more than two years ago, and for that reason I have no independent recollection of making this offer and inquiry in said case, but in view of my long established practice in such cases and the fact that I imposed a long prison sentence, I am positive to a moral certainty that I did so inquire of said Forrest Holiday whether or not he desired to be represented by counsel before I permitted the plea of guilty to be entered in said case.

Andrew Miller, U. S. District Judge.

Dated June 2, 1939.

[fol. 27] IN UNITED STATES DISTRICT COURT FOR THE NORTH-
ERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF ANGUS KENNEDY

Angus Kennedy, being first duly sworn, deposes and says: That he is a duly appointed, qualified and acting Deputy United States Marshal for the District of North Dakota, and as such Deputy aforesaid, he together with S. J. Doyle, the United States Marshal for the District of North Dakota on or about October 22, 1936 transported the petitioner herein, Forrest Holiday, from Fargo, North Dakota to McNeil Island, Washington under a commitment of the United States District Court for the District of North Dakota; that during the course of said trip said petitioner brought up the subject of the sentence imposed upon him by the Honorable

Andrew Miller, Judge of the United States District Court for the District of North Dakota for the offense to which he had pleaded guilty; that said petitioner made a statement to the effect that he had not been accorded fair treatment by the government agent who investigated his case and to whom he had admitted his guilt; he further stated that he had been promised by said government agent that in the event he pleaded guilty he would receive a sentence not to exceed twenty-five years, and that instead of receiving a straight twenty-five year sentence he had been sentenced to serve ten years on the first count of the indictment and fifteen years on the second count, to run consecutively, which meant that he would have to serve the full ten year sentence and the required portion of the fifteen year sentence before he would be eligible for parole; This affiant asked the petitioner why he had not gotten himself an attorney and stood trial, to which the petitioner replied he had no use for an attorney; that he would have been satisfied had he received the sentence promised him, and he further advised this affiant that he had not stood trial because he feared certain things might develop that would not be for the best interests of said petitioner and made the statement: "I knew I would get the book thrown at me."

Angus G. Kennedy.

Subscribed and sworn to before me on this the 3d day of June, 1939. F. G. Talcott, Deputy Clerk,
U. S. District Court.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT FOR THE NORTH-
ERN DISTRICT OF CALIFORNIA

[Title omitted]

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE—Filed July
31, 1939

Now, comes, Forrest Holiday, petitioner in the above entitled cause, through his attorney, Stephen M. White, Esq., and by traverse to the respondent's return to the order to show cause on file herein, admits, denies and alleges, as follows:

I

Admits that he is detained by respondent, James A. Johnston, as Warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of a warrant and order of commitment issued in Criminal Cause Number 6414 on the 13th. day of October, 1936, by the United States [fol. 30] District Court for the District of North Dakota, and transfer order issued at Washington, D. C. by the Bureau of Prisons of the Department of Justice, in the case of said Forrest Holiday; denies that said warrant and order of commitment and said transfer order were regularly issued; denies that the judgment and sentence of said Court, by virtue of which said warrant and order of commitment and said transfer order were issued, were valid.

II

Referring to the affidavit or certificate of Honorable Andrew Miller, Judge of the District Court for the District of North Dakota, denies that the said Andrew Miller inquired of said Forrest Holiday whether or not the latter desired to be represented by counsel at any or during any of the proceedings in said criminal cause.

III

Referring to the affidavit of Deputy United States Marshal Angus Kennedy, denies the statements attributed to the said Forrest Holiday by the said Angus Kennedy, particularly, the statements that "This affiant asked the petitioner why he had not gotten himself an attorney and stood trial, to which the Petitioner replied he had no use for an attorney; that he would have been satisfied had he received the sentence promised him, and he further advised this affiant that he had not stood trial because he feared certain things might develop that would not be for the best interests of said petitioner and made the statement: 'I knew I would get the book thrown at me.' "

Wherefore, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, commanding him to bring the said petitioner into and before the United States District Court [fol. 31] for the Northern District of California, Southern

Division, that he may be released from further unlawful custody.

Stephen M. White, Attorney for Petitioner.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted]

WRIT OF HABEAS CORPUS—Filed December 14, 1939

United States of America to James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California.

Greetings:

We command you that you have the body of Forrest Holiday by you restrained of his liberty and detained in your custody, as is said, by whatever name the said Forrest Holiday may be called or known, together with the day and cause of his being taken and detained by you before the United States Commissioner for the Northern District of California, Southern Division, at the Administration Building of the United States Penitentiary at Alcatraz, California, on the 16th day of December, 1939, at 10 o'clock A. M. of said day; then and there to do, submit and receive whatsoever the United States Commissioner shall then and there consider in that behalf.

Witness, the Honorable Martin I. Welsh, Judge of the United States District Court for the Northern District of California at San Francisco, California, this 8th day of December, 1939.

Walter B. Maling, Clerk, by J. P. Welsh, Deputy Clerk.

[fol. 33] RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA
Northern District of California, ss:

I hereby certify and return that I served the original of the annexed Writ of Habeas Corpus on the therein-named

James A. Johnston by handing to and leaving a true and correct original thereof with James A. Johnston personally at Alcatraz Is. California in said District on the 13th day of December, A. D. 1939.

George Vice, U. S. Marshal, by Herbert R. Cole,
Deputy.

[File endorsement omitted.]

[fol. 34] (Certificate to depositions omitted in printing.)

[fol. 35] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

DEPOSITIONS OF P. W. LANIER AND A. G. KENNEDY

The Notice of taking Depositions dated January 24th, 1940, provided that the Depositions would be taken before Phil B. Vogel, Notary Public, 710 Black Building, Fargo, North Dakota. At 10:00 o'clock A. M. on February 13th, 1940, the hearing was adjourned from 710 Black Building to the Office of the United States Attorney, Third Floor, Federal Building, Fargo, North Dakota. Notice of adjournment and the place to which adjournment was had was left with the person in charge of Mr. Vogel's office at 710 Black Building, and which person was in the office of Mr. Vogel at the Black Building during the taking of the depositions.

The depositions of P. W. Lanier and A. G. Kennedy are taken pursuant to Notice of Taking Depositions, the original of which is attached hereto.

Mart R. Vogel appeared on behalf of the respondent, before Phil B. Vogel, Notary Public.

No appearance was made on behalf of the Petitioner

P. W. LANIER, being first duly sworn, testified as follows:

Q. Will you state your name?

A. P. W. Lanier.

Q. What is your residence, your address, Mr. Lanier?

A. Sunnyside Apartments, Fargo, North Dakota.

Q. What is your business?

A. Attorney.

Q. Are you employed by the government in any capacity?

A. I am.

Q. And what is that capacity?

A. United States Attorney for the District of North Dakota.

Q. How long have you been so employed?

A. Since July 27th, 1933.

[fol. 36] Q. Now, Mr. Lanier, the inquiry which is about to take place arises out of the case of the United States of America vs. Forrest Holiday and others, in the District Court of the United States for the District of North Dakota, Northeastern Division. On September 24, 1936, the Grand Jurors returned an indictment charging Forrest Holiday and others with the violation of Section 588 B of Title 12, United States Code Annotated. There were two counts, the first charging the Defendants with feloniously taking from the presence of the officers of the Farmers State Bank of Maddock, North Dakota, an insured bank under the provisions of Section 12B of the Federal Reserve Act, a large amount of money; the second count charging the Defendants with the use of a dangerous weapon in threatening the officers described in Count No. 1, thus putting in jeopardy the lives of the officers of the bank. Will you state whether or not you ever met or ever became acquainted, in any manner, in your official capacity, with the Defendant Forrest Holiday?

A. I did.

Q. When was that?

A. On the morning of October 13th, 1936.

Q. What was the occasion, Mr. Lanier, for your first meeting him?

A. He was brought into the Federal Court Room at Fargo, North Dakota, for arraignment under the charge that you have just called to my attention.

Q. You were handling the arraignment, were you?

A. I was.

Q. Before whom did you and the Defendant Forrest Holiday appear?

A. Before Judge Andrew Miller, the presiding judge for the District of North Dakota.

[fol. 37] Q. And this was, you state, on October 13th 1936?

A. It was.

Q. Mr. Lanier, will you state whether or not prior to the arraignment did you ever have any conversation with the Defendant Forrest Holiday that you recall of?

A. Prior to the time that I moved his arraignment in the Federal Court, as I have heretofore testified to, I have no recollection of having seen him.

Q. Do you have any independent recollection of the arraignment and the sentencing of Forrest Holiday?

A. I have no independent recollection of what I said to the Defendant nor what the Judge said to the Defendant.

Q. Well, now, how long have you been acting as United States Attorney for the District of North Dakota?

A. Continuously since the 27th of July, 1933.

Q. During that period you have handled, I suppose, hundreds of criminal cases?

A. Yes.

Q. And you, yourself, handle the arraignment proceedings before Judge Miller?

A. Yes.

Q. You have stated, Mr. Lanier, that you handled the arraignment of Forrest Holiday. On the occasion of your arraigning defendants in criminal matters, will you state just what the custom or procedure is which you follow?

A. The invariable rule is, and has been since I have been in this office, that when a defendant appeared for arraignment and who had no attorney, he would be advised by me or one of my assistants handling the arraignment, of the charge against him. He would then be advised by the Court of his constitutional rights. The Court would advise him of his right to have an attorney, and if he had none, would ask him if he wanted an attorney. If he wanted an [fol. 38] attorney, he would be asked if he had money with which to pay him, and if he said he did not have, the Court would advise that an attorney would be appointed for him, and this would be done.

Q. Mr. Lanier, when you speak of the Court, whom specifically do you mean?

A. I mean Judge Andrew Miller. During all of this time he has been the presiding judge.

Q. Mr. Lanier, do you know has Judge Miller ever failed to advise the defendant in a case such as the one in question of his constitutional rights, and in the event the defendant has no lawyer, whether or not he desires counsel?

A. To my knowledge he has never failed to do this.

Q. From your knowledge of the custom and practice of the Federal District Court for the District of North Dakota and of the custom and practice of the Judge, are you in a position to state whether or not in your opinion the charges against Forrest Holiday were read to him and whether or not in your opinion the Court would advise him of his constitutional rights?

A. I am certain that he was advised of the charge against him because I handled the arraignment, and I have never failed to advise a defendant in a felony case of the charge against him when he made an appearance without an attorney. Speaking from my experience before Judge Miller and from my familiarity with the custom that prevails, I am sure to a moral certainty that Judge Miller followed the custom that prevails on this case.

Powless W. Lanier.

A. G. KENNEDY, being first duly sworn, testified as follows:

Q. Will you state your name, please?

A. A. G. Kennedy.

Q. Where do you live, Mr. Kennedy?

[fol. 39] A. Fargo.

Q. What is your business?

A. Deputy United States Marshal.

Q. For the District of North Dakota?

A. Yes.

Q. Mr. Kennedy, the present inquiry has reference to the case of the United States of America vs. Forrest Holiday and others, in the District Court of the United States for the District of North Dakota, Northeastern Division. An indictment by the Grand Jurors was returned on September 24th, 1936, in which Forrest Holiday and others were charged with having violated the provisions of Section 588B of Title 12, United States Code Annotated. Mr. Kennedy, how long have you acted as Deputy United States Marshal?

A. Since September 1st, 1933.

Q. Continuously over that period?

A. Yes, sir.

Q. Well, now, as such Deputy United States Marshal, did you ever have occasion to meet with Forrest Holiday, whom I spoke of just a minute ago?

A. I had.

Q. Do you remember when that was?

A. Well, it would be the day he was sentenced, would be the first day. I remember I transported him from the jail over to the Federal Building.

Q. The records indicate that the day of the sentencing was October 13th, 1936. Is that about correct?

A. That is about correct, I would say.

Q. What was the occasion for your first meeting Mr. Holiday?

A. I fetched him from the county jail to the Court Room here for sentencing.

A. After the sentencing what happened then, if anything?
[fol. 40] A. Well, as near as I remember, we took him back to the jail.

Q. By we, you mean who?

A. Well, Bill O'Leary, another Deputy.

Q. Took him back to the jail here in Fargo?

A. Yes. I recall the statement he made coming out of the Court Room, "Take me out and shoot me."

Q. Well, now, after taking him to the county jail here at Fargo, what did you do with him subsequently, if anything?

A. Later, on the 21st of October, Mr. Doyle, the Marshal, and myself transported him to McNeil Island.

Q. Where is McNeil Island?

A. That is out of Seattle.

Q. What was the reason for your taking him out there?

A. That is where he was supposed to serve his sentence,

Q. That is, Seattle, Washington?

A. Seattle, Washington.

Q. What was your mode of transportation?

A. Transported him by airplane.

Q. From Fargo to Seattle?

A. From Fargo to Seattle, yes.

Q. Who accompanied you, did you say?

A. Mr. Doyle.

Q. During the course of your travel with Mr. Holiday and Mr. Doyle did you have any conversation with Holiday?

A. Yes, we had.

Q. That was on October 21st, 1936, or a day or so thereafter?

A. Yes. It was on October 21st.

Q. Where did the conversation take place?

A. Well, in riding out from the jail to the airport.

Q. Was anyone else present that you know of besides Mr. Doyle and Mr. Holiday.

[fol. 41] A. Well, I believe that—I would say that Howard Strack took us out. I think he took us out.

Q. Did you have any conversation with Holiday with respect to the sentence imposed on him by Judge Miller?

A. Well, he was terribly sore at the Judge. He claimed that he had made a deal with the F. B. I. men that he would plead guilty and take a twenty-five year sentence, but that he did not figure that he was going to get two sentences, ten and fifteen years. He kept talking about that all the time, telling about what a raw deal he got. I asked him, "Why didn't you get an attorney and fight the case?" His statement was something to the effect that he couldn't afford to go to Court, that if he did they would hang him. There was more or less conversation all the way down.

Q. Mr. Kennedy, you stated that there was some conversation between you and Holiday with reference to an attorney, that you asked Holiday why he did not get an attorney. During the course of your trip did Holiday at any time indicate that he desired an attorney?

A. No.

Q. Did he at any time indicate that he did not know what the charge was against him?

A. No.

A. G. Kennedy.

[fol. 42] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted]

NOTICE OF TAKING DEPOSITIONS—Filed Feb. 20, 1940

Stephen M. White, Esq., Attorney for Petitioner:

You will please take notice that on Tuesday, February 13, 1940, at 10:00 o'clock A. M. the deposition of P. W. Lanier, United States Attorney for the District of North Dakota, will be taken on behalf of the respondent herein, before Philip B. Vogel, Notary Public, 710 Black Building, Fargo, North Dakota.

Upon completion of the above deposition, respondent will, before the said Notary Public at the said office in Fargo, North Dakota, take the deposition of Angus Kennedy, Deputy United States Marshal for the District of North Dakota.

The said witnesses reside in North Dakota and at a distance of more than one hundred miles from the place where the trial and hearing on the above entitled matter will occur. The examination of said witnesses will proceed from day to day until completed. The said Notary Public before whom these depositions will be taken is not of counsel for either of the parties to, nor is he interested in this cause. You are notified to attend these depositions and cross-examine.

Dated at San Francisco, California, this 24th day of January, 1940.

Frank J. Hennessy, United States Attorney. A. J.
Zirpoli, Assistant United States Attorney.

[fol. 43] Affidavit of Mailing

UNITED STATES OF AMERICA,

State and Northern District of California, City and
County of San Francisco, ss:

A. J. Zirpoli, being first duly sworn, deposes and says: That he is a citizen of the United States over the age of twenty-one years; that he is an attorney-at-law and an Assistant United States Attorney for the Northern District of California, and that he resides in the City and County of San Francisco, State of California; that Stephen M. White, Esq., Attorney for the above-named petitioner, has his law offices at 550 Montgomery Street, San Francisco, California; that in San Francisco, California there is a United States Post Office with regular daily mail service to all parts of said City, including the office of Stephen M. White, Esq., at 550 Montgomery Street; that on the 24th day of January, 1940, affiant served a true copy of the above Notice of Taking of Deposition on said Stephen M. White, Esq., by depositing a copy thereof on the said date, in the Post Office at San Francisco, California, properly enclosed in a sealed envelope, addressed to Stephen M. White, Esq., Attorney at Law, 550 Montgomery Street, San Fran-

cisco, California and prepaid the postage due for the mailing of said envelope.

A. J. Zirpoli, Assistant United States Attorney.

Subscribed and sworn to before me this 24th day of January, 1940. Ernest E. Williams, U. S. Commissioner Northern District of California, at S. F. (Seal.)

[File endorsement omitted.]

[fol. 44] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted]

REPORT OF UNITED STATES COMMISSIONER—Filed May 23, 1940

To the Honorable Court above named:

This is a proceeding in habeas corpus filed by Forrest Holiday, petitioner, to secure a discharge from confinement in the United States Penitentiary, Alcatraz, California.

For convenience Forrest Holiday, petitioner, will be designated as "petitioner"; and James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, will be designated as "respondent".

This Court made the matter returnable before the undersigned on December 16, 1939 at the United States Penitentiary at Alcatraz, California.

[fol. 45] Accordingly, on December 16, 1939, your Commissioner conducted a hearing at the United States Penitentiary as aforesaid. Petitioner was present in person and was represented by Stephen M. White, Esq., Attorney at Law; respondent was represented by A. J. Zirpoli, Esq., Attorney at Law. Petitioner testified in his own behalf. The matter was continued until January 15, 1940, for the purpose of enabling respondent to obtain certain depositions. It was, for the same reason, continued until April 30, 1940.

Facts Pertaining to the Instant Matter

On September 24, 1936, petitioner, under the name of James Thomas, was indicted in two counts in the United States District Court of North Dakota, Northeastern Divi-

sion. Count One charged bank robbery; count two charged placing the lives of certain bank officials in jeopardy by the use of a dangerous weapon, to-wit: an automatic pistol. (Both counts charged a violation of Section 588B, Title 12 U. S. C. A.).

Petitioner was arrested in Excelsior Springs, Missouri, and thereafter consented to removal to Fargo, North Dakota. On October 13, 1936 he was taken before Honorable Andrew Miller, United States District Judge, and, after a reading of the indictment, pleaded guilty to both counts and was sentenced to imprisonment of ten years on the first count, and fifteen years on the second count, the said sentence on the second count to run consecutively.

Petitioner was committed to the United States Penitentiary, McNeil Island, Washington, and was thereafter transferred to the United States Penitentiary, Alcatraz, California.

[fol. 46] Testimony of Petitioner

Petitioner testified that he was 36 years old, almost 37, on the date of the hearing of December 19, 1939. He completed one year of high school.

Petitioner's Criminal Record

He claimed that his criminal record consisted of six or eight arrests. When he was sixteen years of age, he was arrested on a vagrancy charge and although he declared that he pleaded not guilty, he was sentenced to ten days or pay a fine of \$19.95.

In 1925 he was arrested in Fargo, North Dakota, in proceedings for extradition to Hudson, Wisconsin, for the offense of larceny. He employed an attorney to represent him in Fargo, North Dakota. He was extradited to Wisconsin. A sentence of from one to ten years was imposed by the Wisconsin State Court. In response to this sentence, he served three years in the reformatory and six months in the State Penitentiary. He enjoyed the assistance of employed counsel while he was before the Wisconsin Court.

Petitioner's Testimony Regarding the Instant Case

As previously stated, petitioner was arrested in Excelsior Springs, Missouri. He declared the arrest was effected by two agents of the Federal Bureau of Investigation of the Department of Justice. They haled him before

a United States Commissioner in Kansas City, Missouri, on removal proceedings to Fargo, North Dakota. He engaged counsel to defend him in said removal proceedings. He contended that he first resisted removal to North Dakota, [fol. 47] but was advised by his attorney that, inasmuch as he had been indicted, nothing could be done for him and he might as well return to North Dakota. Petitioner maintained that the two arresting Federal Bureau of Investigation agents induced him to plead guilty by recommending a severe sentence provided he refused to do so and a lighter sentence if he complied with their demands. His testimony was as follows:

"Two Department of Justice men appeared on several occasions, and at the final appearance of the two different Department of Justice men, they insisted that I waive extradition and make a statement to the effect that I was guilty. They told me that if I didn't, why, they would give me a large amount of years * * approximately 80 years * * and if I had any witnesses, why, they would see that they got ten years. If I could waive extradition, and sign a statement, they would recommend that I not get more than ten years." (Vide: Transcript, pages 3 and 4.)

Petitioner admitted that he signed a waiver of removal and a confession that he was implicated in the robbery. He testified that he was produced before Judge Miller and that after the first count was read to him that he entered a plea of guilty; that the second count was then read to him, he hesitated and was instructed by the Court that "anyone who was guilty of any part of it, was guilty of all." He, therefore, pleaded guilty to the second count.

He was not represented by counsel while he was in the United States District Court in Fargo, North Dakota. No one, including the Court, he declared, advised him of his constitutional right to such representation. He did not know that the Court would appoint counsel for him.

Evidence Presented by Respondent

Respondent's "Return to Order to Show Cause" includes copies, duly certified, of the following:

- [fol. 48] (1) The indictment;
- (2) Judgment and sentence;
- (3) Commitment, and

(4) Docket entries.

Said return also incorporates a certificate from the Honorable Andrew Miller, Judge of the United States District Court for the District of North Dakota. Judge Miller, who sentenced petitioner, averred that it was his uniform practice "to inquire of defendants appearing before me, without counsel, charged with the commission of felonies, whether or not they desired counsel, and if so to offer to appoint counsel; that sentence in case of United States v. Forrest Holiday was imposed more than two years ago, and for that reason I have no independent recollection of making this offer and inquiry in said case, but in view of my long established practice in such cases and the fact that I imposed a long prison sentence, I am positive to a moral certainty that I did so inquire of said Forrest Holiday whether or not he desired to be represented by counsel before I permitted the plea of guilty to be entered in said case."

In addition, respondent's said return embraces an affidavit of Angus Kennedy who, as Deputy United States Marshal for the District of North Dakota, aided in transporting petitioner to the United States Penitentiary, McNeil Island. Angus Kennedy stated that petitioner expected to get a sentence of twenty-five years in one sentence rather than one of ten years on the first count and fifteen on the second count, to run consecutively. Also, petitioner stated that, "he had no use for an attorney * * * that he had not stood trial because he feared certain things might develop that would not be for the best interests of said petitioner [fol. 49] and made the statement, "I knew I would get the book thrown at me."

On the occasion of the hearing of April 30, 1940 petitioner was represented by his counsel Stephen M. White, Esq., respondent was represented by A. J. Zirpoli, Esq., Assistant United States Attorney for the Northern District of California. Respondent, on the latter date, produced an admission of implication in the bank robbery, which was duly signed by petitioner. (Vide: Respondent's Exhibit 2, April 30, 1940). Also, respondent introduced a waiver of removal executed by petitioner. (Vide: Respondent's Exhibit 1, April 30, 1940).

Respondent further presented the depositions of P. W. Lanier, United States Attorney for the District of North

Dakota, who prosecuted petitioner, and of A. G. Kennedy, Deputy United States Marshal; United States Attorney P. W. Lanier deposed that he had no independent recollection of the remarks the Court made at the time of sentencing petitioner but it was the invariable practice of the Court to advise defendants of their constitutional right to counsel, and to appoint counsel if a defendant so desired; that he was positive that Judge Miller followed his custom in the instant matter.

Deputy United States Marshal A. G. Kennedy stated that petitioner informed him that he "could not afford to go to Court, that if he did they would hang him."

Petitioner's Grounds for Discharge

In his Amended Petition for a writ of habeas corpus, petitioner presented two grounds therefor, to-wit: One, that he was deprived of his constitutional right in that he [fol. 50] did not have the assistance of counsel; that he did not know that he was entitled to such representation; and that he did not competently and intelligently waive such right. Two, that petitioner was sentenced for the violation of two offenses; that both counts involved the same evidence and constituted but one action and but one offense; that petitioner had been twice put in jeopardy for the same offense.

Findings of Fact

- (1) Petitioner's criminal experience enabled him to understand and appreciate his rights;
- (2) Petitioner voluntarily entered a plea of guilty after thoroughly understanding the charges involved;
- (3) It was the uniform practice of the Court in which sentence was imposed to inquire of those charged with felonies whether or not they wished counsel;
- (4) The Court in which sentence was imposed advised petitioner of his constitutional right to be represented by counsel;
- (5) Petitioner voluntarily signed an admission of guilt;
- (6) Petitioner competently and intelligently waived his right to the assistance of counsel.

The Law

Habeas corpus cannot be employed to challenge the validity of consecutive sentences on two separate counts until the expiration of the lawful sentence imposed on the first count.

Vide: *McNally v. Hill*, 293 U. S. 131.

[fol. 51] Supporting affidavits are proper evidence in habeas corpus proceedings.

Vide: *Lewis v. Johnston* (9-CCA, No. 9351, May 16, 1940).

The accused may waive his constitutional right to counsel.

Vide: *Johnson v. Zerbst*, *ubi supra*;

Buckner v. Hudspeth, 105 F. (2d) 396;

Warden v. Johnston, 29 Fed. Supp. 207.

Whether there has been a competent, intelligent waiver of the right to counsel depends upon the particular facts and circumstances surrounding each case.

Vide: *Johnson v. Zerbst*, *ubi supra*;

Cooke v. Swope, 109 F. (2d) 955;

Also see 28 Supp. 492.

Buckner v. Hudspeth, *ubi supra*.

The background and experience of the accused may be considered in determining the question of a waiver of the right to counsel.

Vide: *Johnson v. Zerbst*, *ubi supra*;

Buckner v. Hudspeth, *ubi supra*.

The onus probandi is imposed upon the petitioner to establish that he did not competently and intelligently waive his right to the protection of counsel.

Vide: *Johnson v. Zerbst*, *ubi supra*;

Buckner v. Hudspeth, *ubi supra*;

Nivens v. Hudspeth, 105 F. (2d) 756;

Warden v. Johnston, *ubi supra*.

[fol. 52] Application of the Law to the Instant Facts

Petitioner's attack upon the validity of the sentence is, prior to serving the sentence on the first count, premature under *McNally v. Hill*, *ubi supra*.

The experience petitioner achieved in criminal proceedings, his voluntary pleas of guilty to both counts; the uni-

form practice of the Court to advise those accused of felonies of their constitutional right to be represented by counsel—a practice which your Commissioner finds was followed in the instant matter, lead to the conclusion that petitioner competently and intelligently waived his right to the benefit of counsel.

Recommendation

Predicated upon the facts and the law your Commissioner is compelled to recommend that petitioner's application be denied.

Dated, May 23rd, 1940.

Respectfully submitted, Ernest E. Williams, United States Commissioner.

[File endorsement omitted.]

[fol. 53] RESPONDENT'S EX. (1) APRIL 30, 1940—ERNEST E. WILLIAMS

After Tuesday Oct. 6th, 1936, I will agree to wa-ve all rights & return from this U. S. District to any U. S. district.

Oct. 4th, 1936.

I, Forrest Holiday, having been first fully informed by V. R. Clary & D. A. Bryce, Special Agent of the Federal Bureau of Investigation of the Department of Justice, that I have the right not to be removed from the Judicial District in which I was taken into custody without being first arraigned before a duly authorized judicial officer or magistrate and except by virtue of a warrant of removal issued for that purpose, do hereby waive my right to be arraigned before a duly authorized judicial officer or magistrate and my right not to be removed from the said judicial district except by virtue of a warrant of removal issued by that purpose, and do hereby freely consent and agree that I may be forthwith removed by representatives of the Department of Justice in their discretion to any judicial district of the United States, either for the purpose of questioning or for the purpose of being held to answer any criminal charge.

I am executing this waiver and consent of my own free will, and without any pressure, compulsion or coercion of any kind whatsoever.

The foregoing document was read to me before I signed it, and I fully understand its meaning and purport.

Forrest Holiday.

Witnesses: D. A. Bryce, Special Agent, Federal Bureau of Inv., U. S. Dept. of Justice, 610 Alonzo Ward Hotel Bldg., Aberdeen, S. D. V. R. Clary, Special Agent, Federal Bureau of Investigation, U. S. Dept. of Justice, 1616 Federal Reserve Bank Bldg., K. C., Mo.

[fols. 54-55] RESPONDENT'S EX. (2) APRIL 30, 1940—
ERNEST E. WILLIAMS

I, Forrest Holiday, on the Fourth day of October, 1936, make the following Statement to V. R. Clary and D. A. Bryce, who I know to be Special Agents of the Federal Bureau of Investigation, U. S. Dept. of Justice. I make this statement of my own free will with no threats or promises being made me.

I was implicated in the robbery of the Maddock Farmers State Bank May 26th, 1936.

Signed X Forrest Holiday.

Witness: D. A. Bryce, Special Agent, Federal Bureau of Investigation, U. S. Dept. of Justice, 610 Alonzo Ward Hotel, Aberdeen, S. D. V. R. Clary, Special Agent, Federal Bureau of Investigation, U. S. Dept. of Justice, 1616 Federal Reserve Bank Bldg., Kansas City, Mo.

[fol. 56] IN UNITED STATES DISTRICT COURT FOR THE NORTH-
ERN DISTRICT OF CALIFORNIA

[Title omitted]

Before: Hon. Ernest E. Williams, U. S. Commissioner.

Tuesday, April 30, 1940, 11:45 o'clock A. M.

Counsel Appearing:

For the Petitioner: Stephen M. White, Esq.

For the Respondent: A. J. Zirpoli, Esq., Ass't U. S. Att'y.

The Commissioner: This is a continuance from the last hearing. Mr. Stephen M. White represents the petitioner. You have these depositions. Do you wish to offer them?

Mr. Zirpoli: Yes.

The Commissioner: The deposition of P. W. Lanier and A. G. Kennedy will be received in evidence at this time.

Mr. White: Well, I was going to object.

The Commissioner: Do you want to make your objection?

Mr. White: To about three-fourths of the questions and answers. Do I have to point them all out?

The Commissioner: Yes, you have to be specific. Do you want the deposition read now?

Mr. White: Well, I don't think it will be necessary to [fol. 57] read it.

Mr. Zirpoli: They may be deemed as having been read, subject to objections you are about to make.

Mr. White:

The Commissioner: That will be satisfactory.

Mr. White: Referring to page 4 of Lanier's deposition there appears the following question:.

"Q. Well, now, how long have you been acting as United States Attorney for the District of North Dakota?

A. Continuously since the 27th of July, 1933.

"Q. During that period you have handled, I suppose, hundreds of criminal cases."

I object to that question on the ground it is incompetent, irrelevant, and immaterial, and ask that the answer "Yes" be stricken.

Mr. Zirpoli: I will merely make the observation that that is a preliminary question.

The Commissioner: Objection overruled and motion denied.

Mr. White: On the same page there appears the following question:

"Q. You have stated, Mr. Lanier, that you handled the arraignment of Forrest Holiday. On the occasion of your arraigning defendants in criminal matters, will you just state what the custom or procedure is which you follow?"

I object to that question upon the ground it is incompetent, irrelevant, and immaterial, as to what the custom or procedure of Mr. Lanier is in handling criminal cases.

The Commissioner: Objection overruled.

Mr. White: And ask that the answer "The invariable rule is, and has been since I have been in this office, that when a defendant appeared for arraignment and who had no attorney, he would be advised by me or one of my assistants [fol. 58] handling the arraignment, of the charge against him. He would then be advised by the Court of his constitutional rights. The Court would advise him of his right to have an attorney, and if he had none, would ask him if he wanted an attorney. If he wanted an attorney, he would be asked if he had money with which to pay him, and if he said he did not have, the Court would advise that an attorney would be appointed for him, and this would be done."

I move that the answer be stricken out upon the same ground, that it is incompetent, irrelevant, and immaterial.

The Commissioner: Motion denied.

Mr. White: Referring to page 5 of the deposition of Mr. Lanier, I object to each and every question appearing on that page.

The Commissioner: May I see it?

Mr. White: Yes.

The Commissioner: What is the ground of the objection?

Mr. White: This question is incompetent, irrelevant, and immaterial in that the question merely goes to custom and practice.

The Commissioner: Objection overruled.

Mr. White: I also move that each and every answer given to each and every question appearing on pages 5 and 6 be stricken.

The Commissioner: Motion denied.

Mr. White: Very well.

Mr. Zirpoli: I also move to introduce in evidence at this time—

The Commissioner: The depositions may be introduced, as previously indicated.

Mr. Zirpoli: And deemed read into evidence?

[fol. 59] The Commissioner: And deemed read into evidence.

Mr. White: And it may be noted that I have taken an exception to each of the Court's rulings?

The Commissioner: It may be so noted.

Mr. Zirpoli: At this time I want to introduce in evidence the waiver and consent to removal on the part of Forrest Holiday signed on October 4, 1936.

Mr. White: I object to the introduction in evidence of the document purporting to be a waiver on the ground it is immaterial.

Mr. Zirpoli: You do not question his signature?

Mr. White: No.

The Commissioner: Objection overruled and it may be introduced as Respondent's Exhibit No. 1, April 30, 1940, in evidence.

(The document was marked "Respondent's Exhibit No. 1, April 30, 1940.")

Mr. White: Exception noted.

Mr. Zirpoli: I also wish to introduce in evidence a statement made by Forrest Holiday on October 4, 1936, which bears his signature, and the concluding paragraph of which says, "I was implicated in the robbery of the Maddock Farmers' State Bank May 26, 1936."

Mr. White: I object to the introduction in evidence of the purported statement of Holiday on the ground it is incompetent, irrelevant, and immaterial.

The Commissioner: Objection overruled.

Mr. White: Exception.

The Commissioner: It may be introduced as Respondent's Exhibit No. 2 of this date.

(The document was marked "Respondent's Exhibit No. [fol. 60] 2, April 30, 1940.")

(Endorsed.) Filed May 23, 1940, Walter B. Maling, Clerk.

[fol. 61] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 22940-W

FORREST HOLIDAY, Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California, Respondent.

Hearing on return to Writ of Habeas Corpus before Ernest E. Williams, United States Commissioner, Northern

District of California, on Tuesday, the 19th day of December, 1939, at the hour of 11:00 o'clock A. M. thereof, at the United States Penitentiary, Alcatraz, California.

STEPHEN M. WHITE, Esq., appeared on behalf of Petitioner.

A. J. ZIRPOLI, Esq., appeared on behalf of Respondent.

FORREST HOLIDAY produced as a witness in his own behalf, having been first duly sworn, testified as follows:

Mr. Williams: This is a petition for application of a Writ of Habeas Corpus on your part, and the United States District Court referred it to me to take testimony, and that is why we are here today.

Mr. Holiday: I understand.

Mr. Williams: All right. You may proceed.

Examination by Mr. White.

Mr. White:

Q. Your name is Forrest Holiday, is that correct?

A. Yes, sir.

Q. And you petitioned the United State District Court at San Francisco for a writ of Habeas Corpus?

A. Yes, sir.

Q. You are in the custody of James A. Johnston, as Warden, United States Penitentiary at Alcatraz, California?

A. Yes, sir.

Q. And you are in his custody by virtue of a sentence imposed by the United States District Court at Fargo, North Dakota, on October 13, 1936, is that correct?

[fol. 62] A. Yes, sir.

Q. Where were you arrested, Mr. Holiday, on the charges out of which your present imprisonment arises?

A. In Excelsior Springs, Missouri.

Q. What was that date of your arrest, if you recall?

A. I have no exact remembrance; but it was approximately September 21, 1936.

Q. By whom were you arrested?

A. By two agents of the F. B. I.

Q. Do you recall their names?

A. I have never heard their names.

Q. Following your arrest by two agents of the Federal Bureau of Investigation at Excelsior Springs, Missouri, you were taken by these agents to Kansas City, Missouri, is that correct?

A. Yes, sir.

Q. Did you appear before the United States Commissioner at Kansas City on or about October 7, 1936, in removal proceedings?

A. About that date.

Mr. Williams: That is, about October 7?

Mr. White: Yes, 1936.

Q. Were you in jail in Kansas City?

A. Yes, sir.

Q. Immediately prior to your hearing before the United States Commissioner?

A. Yes, sir.

Q. For how long a period were you in prison at Kansas City?

A. Approximately two weeks.

Q. Did you resist the removal proceedings which were instituted against you in Kansas City, or did you consent to be removed?

A. I resisted them for a period of time; then I consented.

Q. In consenting to your removal from Kansas City to Fargo, North Dakota, were any representations made to you by any officer of the United States Government, respecting leniency which might be shown you in the event that you [fol. 63] pled guilty to the charges under which you stood indicted?

A. Yes, sir.

Q. What representations were made?

A. Two Department of Justice men appeared on several occasions; and at the final appearance of the two different Department of Justice men, they insisted that I waive extradition and make a statement to the effect that I was guilty. They told me that if I didn't, why, they would give me a large amount of years—approximately 80 years—and if I had any witnesses, why, they would see that they got ten years. If I would waive extradition, and sign a statement, they would recommend that I not get more than ten years.

Q. Do you recall the names of these Department of Justice agents who made these representations?

A. No, I don't; their names are attached to the waiver.

Q. That waiver was signed at Kansas City?

A. At Kansas City.

Q. Upon consenting to a waiver and agreeing to go to Fargo, North Dakota, to answer the indictment which had been filed against you at Fargo, North Dakota, who accompanied you from Kansas City to Fargo, North Dakota?

A. A United States Marshal, and a Deputy Marshal.

Q. Do you recall the date of your arrival at Fargo, North Dakota?

A. Only that we arrived there on Saturday morning.

Q. How many days after your arrival did you appear in court at Fargo, North Dakota?

A. The following week—about four days later.

Q. Were you in jail continuously from the time of your arrival at Fargo, North Dakota, until the time that you appeared in court?

A. Yes, sir.

Q. Were you visited by any friends during the time that you were in jail at Fargo, North Dakota?

A. No, sir.

Q. Were you visited by any attorney?

A. No, sir.

[fols. 64-65] Q. Did you consult any attorney while you were in prison at Fargo, North Dakota?

A. No, sir.

Q. When you appeared in court at Fargo, North Dakota, to answer the indictment which had been filed against you, did you have an attorney?

A. No, sir.

Q. Do you recall the name of the Judge who presided in the court at the time of your appearance in North Dakota?

A. Only after I saw my papers, I knew his name.

Q. His name was Judge Andrew Miller, is that correct?

A. Yes, sir.

Q. How many appearances in court did you make at Fargo, North Dakota?

A. Just one.

Q. And on the occasion of that one appearance, did you

plead guilty to the indictment which had been filed against you?

A. Yes, sir.

Q. Was the indictment read to you by the Clerk of the court when you appeared in court on that one occasion?

A. No, sir.

Q. Did Judge Miller inquire of you as to whether or not you desired to have counsel to represent you in the proceedings?

A. No, sir.

Q. Did Judge Miller, on the occasion of your appearance in court, advise you that you had the right to have counsel represent you?

A. No, sir.

Q. Do you recall the name of the United States Attorney who appeared for the Government in the proceedings at Fargo, North Dakota?

A. Only through reading my papers.

Q. What was his name?

A. Mr. Lanier.

Q. Did Mr. Lanier appear in court for Judge Miller at the time of your plea in the interests of the Federal Government?

A. Yes, sir.

Q. Did Mr. Lanier advise you that you had the right to have counsel?

A. No, sir.

Q. Did Mr. Lanier inquire of you as to whether or not [fol. 66] you desired to have counsel?

A. No, sir.

Q. And, as a matter of fact, you did not have counsel at any stage of the proceedings before the United States District Court at Fargo, North Dakota?

A. No, sir.

Q. Did you know that you had the right to have counsel at the time of your appearance in court at Fargo, North Dakota?

A. Not without money to pay him; I did not.

Q. Did you have any money or financial resources to engage counsel to represent you in the proceedings at Fargo, North Dakota?

A. Not enough to pay a lawyer's fee.

Q. What was the extent of your financial resources at the time of your appearance before the Court at Fargo, North Dakota?

A. Approximately \$20.00.

Q. Do you recall the extent of the sentence imposed on you by the United States District Court at Fargo, North Dakota?

A. Yes.

Q. What were your sentences?

A. I was sentenced to 10 years on count 1; 15 years on count 2; the second count to begin at the expiration of the first count.

Mr. Williams: That is, 25 years?

The Witness: 25 years.

Mr. White: Q. Following the proceedings of the United States District Court at Fargo, North Dakota, you were taken to McNeil Island to serve out the terms of the imprisonment, is that correct?

A. Yes, sir.

Q. Were you taken to McNeil Island, from Fargo, North Dakota by one, Angus Kennedy, a Deputy United States Marshal?

A. Yes, sir.

Q. What was the mode of conveyance from Fargo, North Dakota, to McNeil Island?

A. We rode in an airplane from Fargo to Seattle.

Q. And at Seattle, did Mr. Kennedy deliver you into the [fol. 57] custody of another Government agent?

A. No, sir; I was put in the county jail over night.

Q. Who took you from the county jail to Seattle to McNeil Island?

A. A police van—or a prison van—I don't know which it was—with a number of other prisoners.

Q. Was Mr. Kennedy, the gentleman who took you from Fargo to Seattle, in that van with you?

A. Yes, sir; Mr. Kennedy was.

Q. On your trip from Fargo, North Dakota, to Seattle, on which trip you were traveling by airplane, did you have any conversation with Mr. Kennedy in respect to your failure to have an attorney represent you at the proceedings before the United States District Court at Fargo, North Dakota?

A. No, sir.

Q. Did Mr. Kennedy ask you why you had not gotten yourself an attorney and stood trial?

A. No, sir.

Q. Did you tell Mr. Kennedy that you had no use for an attorney?

A. No, sir.

Q. Now, at the proceedings before the United States District Court at Fargo, North Dakota, did any Government agent appear in court to give testimony?

A. There was one just before, I was sentenced.

Q. There was only one agent appearing in court, is that correct?

A. Yes, sir.

Q. Did that agent make any recommendation to the Court for leniency in your behalf?

A. No, sir.

Q. Did the United States Attorney who appeared in court in behalf of the Government make any representations to the Court for leniency in your behalf?

A. No, sir.

Q. What is the extent of your education, Mr. Holiday?

A. I have had approximately a year in high school.

Q. Are any members of your family attorneys?

A. No, sir.

[fol. 68] Q. Have you any friends that are attorneys?

A. No, sir.

Q. What is the extent of your experience in court, aside from the experience that you had at Fargo, North Dakota, on the charges out of which your present imprisonment arises?

A. I appeared in court in Wisconsin where I employed an attorney to represent me; that was in 1926.

Q. That was at what place in Wisconsin?

A. Hudson, Wisconsin.

Q. And you state you employed an attorney to represent you at that time?

A. Yes, sir.

Q. Did you have funds available, or financial resources with which to engage the attorney?

A. Yes, sir.

Q. Did you ever appear in court on any other occasion?

A. On another occasion in Fargo, North Dakota, on extradition; I employed an attorney there.

Q. When was that?

A. 1925; December, 1925.

Q. Did you have finances with which to engage an attorney on that occasion?

A. Yes, sir.

Q. Did you pay the attorney?

A. Yes, sir.

Q. Have you appeared in court on any other occasions with or without an attorney?

A. In Oklahoma, about 20 years ago.

Mr. Williams: Where?

The Witness: Oklahoma.

Mr. White: Q. Did you have finances sufficient to engage an attorney on that occasion?

A. No, sir.

Q. By whom was the attorney engaged that represented you?

A. I had no attorney.

Q. You didn't have an attorney on that occasion?

A. No, sir.

Q. Were you ever advised by any government, state, county or city official, or by any person whomsoever, prior [fol. 69] to the time that you were pled guilty at Fargo, North Dakota, on October 13, 1936, that you were entitled to have counsel to represent you in a criminal proceeding if you were without funds to provide for counsel?

A. No, sir.

Mr. White: That is all.

Examination by Mr. Zirpoli:

Q. You were arrested at Excelsior Springs, Missouri?

A. Yes, sir.

Q. You were arrested by two agents of the Federal Bureau of Investigation?

A. Yes, sir.

Q. And you do not now know their names?

A. I do not.

Q. You haven't the slightest idea what their names were?

A. No, sir.

Q. Did they take a statement from you at the time of your arrest?

A. No, sir.

Q. They questioned you?

A. Yes, sir.

Q. But they took no statement?

A. No, sir.

Q. They took an oral statement from you?

A. No, sir.

Q. Or a written statement?

A. No, sir.

Q. Then you were taken to Kansas City, and you appeared before a Commissioner?

A. Yes, sir.

Q. Do you remember the name of the Commissioner?

A. I believe his name was Mr. McDonald.

Q. How many times did you appear before the Commissioner?

A. Three different times.

Q. Did you have an attorney at any time there?

A. Yes, sir.

Q. You did have an attorney?

A. Yes, sir.

Q. What was his name?

A. Proctor.

Q. And his first name?

A. I do not know.

Q. You paid him?

A. Yes, sir.

Q. On how many occasions did he appear with you before [fol. 70] the Commissioner?

A. On two occasions.

Q. Did he advise you to consent to removal?

A. After he found out that I had been indicted, he advised me that he couldn't help me there, and withdrew from the case.

Q. Then you signed a waiver?

A. Yes, sir.

Q. Had you signed a waiver before this advice from your attorney?

A. No.

Q. Then you signed a waiver on advice of your attorney?

A. No, sir.

Q. He advised you before you signed it, nevertheless?

A. He advised me that I might as well go to North Dakota, because he couldn't do anything for me in Kansas City.

Q. Did he say the reason was because an indictment had been returned?

A. Yes.

Q. You signed this waiver before agents of the Federal Bureau of Investigation?

A. Yes.

Q. Were they the same agents that arrested you?

A. No, sir.

Q. They were entirely different men?

A. Yes, sir.

Q. Now, you signed that waiver on advice of the attorney — not because those agents had made representations to you, isn't that the fact?

A. No, sir.

Q. Do you know the names of those agents at all, before whom you signed the waiver?

A. I can't recall their names.

Q. Who made these representations, that you spoke of, to you?

A. These two agents.

Q. At Kansas City?

A. At Kansas City.

Q. The same agents who witnessed your waiver?

A. Yes, sir.

Q. They signed this waiver?

A. Yes, sir.

Q. What representations did they make to you at that time?

[fol. 71] A. That if I didn't sign the statement and a waiver for them, they would see that I got 80 years or more time; that if I got any witnesses, they would see that they got 10 years.

Q. That is the language they used?

A. Yes, sir.

Q. Where did you sign this waiver?

A. In the county jail at Kansas City.

Mr. Williams: This waiver you are talking about is just a waiver of extradition?

The Witness: Removal.

Mr. Williams: Technically, it is extradition still.

Mr. Zirpoli: All right.

Mr. Williams: That was signed where?

Mr. Zirpoli: In the county jail.

Q. Now, let me get this straight. How many times did you say your attorney appeared with you?

A. On two occasions.

Q. You appeared before the Commissioner on three occasions?

A. Yes.

Q. Did you have your attorney the first time you appeared?

A. Yes.

Q. And you had one the second?

A. On the third occasion, if I remember right.

Q. Your memory is, you had any attorney on the first and third hearings?

A. Yes, sir.

Q. And you didn't have him on the second, is that right?

A. No, sir.

Q. Then you were accompanied from Kansas City to Fargo by the United States Marshal and the Deputy?

A. Yes.

Q. Do you know the name of the marshal?

A. No, sir.

Q. Do you know the name of the Deputy?

A. No, sir.

Q. Upon your arrival in Fargo, where did they take you?

A. To the Post Office Building, at first.

Q. Getting back to Kansas City, you were in the county [fol. 72] jail there?

A. Yes, sir.

Q. Were you in a ward in which Federal prisoners were kept?

A. Yes.

Q. Did you talk your case over with any prisoners?

A. No.

Q. With no one in the prison?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Were you able to talk to other prisoners in that ward?

A. Yes, sir.

Q. Did you talk to any of the other prisoners about their cases?

A. No, sir.

Q. Do you know whether any prisoners, who were in that ward you were in, had attorneys appointed for them?

A. I do not.

Q. You don't know of any one who did?

A. No, sir.

Q. After you arrived in Fargo, where did they put you?

A. First, in the Post Office Building; then, to the county jail.

Q. Were you in a ward for Federal prisoners there?

A. I was in a ward by myself.

Q. Were you the only prisoner there?

A. In that department, yes.

Q. Did you have an opportunity to talk to other prisoners there?

A. No, sir.

Q. Didn't they let you out to get a little fresh air at any time?

A. They did not.

Q. So you had no contact with other prisoners at Fargo?

A. No, sir; not until after my sentence.

Q. Then, on the day you appeared in court—By the way, had any agents of the Federal Bureau of Investigation been down to see you at the county jail?

A. In Fargo?

Q. Yes.

A. No, sir.

Q. Did you see any agent at any time after you got to Fargo?

A. Yes, sir.

[fol. 73] Q. When?

A. In the court room.

Q. The man that made the statement to the Court at the time you entered your plea of guilty?

A. Yes, sir.

Q. Had you talked to him before that?

A. I had never seen him before.

Q. Had you made a statement of your case to any agent?

A. In Fargo, you mean?

Q. Fargo or Kansas City, or at Excelsior Springs, or en route from any of those places.

A. Will you please put that question again?

Q. Did you ever make a statement to one of the agents or any other officer of the Federal Government at any time, with relation to your case, in which you pleaded guilty?

A. I signed a statement in Kansas City.

Q. And when was that statement signed?

A. The statement was combined with a waiver, and signed at that time.

Q. The statement was combined with a waiver?

A. Yes, sir.

Q. Had you discussed that matter with your attorney?

A. No, sir.

Q. At any time?

A. No, sir.

Q. And that statement was a confession of guilt, was it?

A. The words, as I recall them, was that I was implicated in the robbery.

Q. You said you were implicated in the robbery?

A. Yes.

Q. That is all you said in the statement?

A. Yes.

Q. That is a signed statement, isn't it?

A. Yes.

Q. Is that the only statement you made?

A. Yes.

Q. What did you plead guilty to—what charges?

A. The charges, I understood until I got to North Dakota, were bank robbery.

Q. Was that what you understood you were pleading to [fol. 74] in Court?

A. Yes.

Q. What happened when you got in court? Was there anybody in court? Who was in court when they brought you there?

A. Quite a number of people were there.

Q. Quite a number of people were there?

A. Yes, sir.

Q. The Judge was there?

A. The Judge, yes.

Q. Was the Clerk there?

A. I think so; I don't recall him.

Q. And you said the United States Attorney was there?

A. Yes.

Q. Either the United States Attorney, or his assistant—do you know which it was?

A. No, I am not sure; I believe it was Mr. Lanier.

Q. And the agent from the Federal Bureau of Investigation?

A. Yes.

Q. After they brought you into court, what happened?

A. I was seated until three or four other prisoners were sentenced.

Q. Do you remember the names of any of those prisoners?

A. No, sir.

Q. Three or four were sentenced before you on the same day?

A. Yes, sir.

Q. And you can't tell me the names of any of those men now?

A. No, sir.

Q. Then what happened?

A. My name was called and I stood up; and Judge Miller asked me for a plea.

Q. Didn't they ask you what your name was?

A. Yes.

Q. They asked you what your name was?

A. Yes.

Q. What did they say in that regard? What did they say about your name?

A. I don't recall the exact words.

Q. Did they ask you what your true name was?

A. Yes.

[fol. 75] Q. Did you tell them your name was Forrest Holiday?

A. Yes.

Q. By what name did they call your case?

A. Forrest Holiday, if I remember right.

Q. As you recall, they called your case by Forrest Holiday?

A. Yes.

Q. Then what happened after they called your case and you told them your true name was Forrest Holiday? What happened after that?

A. Judge Miller told me I was charged with robbing a bank at North Dakota, at Maddock.

Q. Judge Miller told you what you were charged with, is that right?

A. Yes, sir.

Q. What did the judge say in that regard?

A. He asked if I was guilty or not guilty.

Mr. Williams: Did he say you were charged with bank robbery?

The Witness: Yes.

Mr. Zirpoli:

- Q. Did he tell you the nature of the charge?
A. Nothing, except a bank robbery.
Q. The judge said that, and that is all he said?
A. As I remember it, yes.
Q. He didn't say anything more than that?
A. I couldn't say right now...
Q. Am I to understand, then, that you don't remember?
A. I don't remember all the words, no, sir.
Q. Did the clerk say anything at all?
A. I never heard the clerk say anything.
Q. Then what did the judge do? Did he ask you what your plea was?
A. Yes.
Q. What did you say?
A. I replied, "Guilty."
Q. How many counts did you plead guilty to?
A. Two.
Q. Did you know at the time that you were pleading guilty to two counts?
[fol. 76] A. Not until after the counts were read to me.
Q. Then the counts were read to you?
A. Yes.
Q. Who read the counts to you?
A. The attorney, or assistant attorney, for the Government.
Q. He read the counts of the indictment?
A. Yes.
Q. And you pleaded guilty to the two counts?
A. Yes.
Q. So you knew the nature of the charges against you?
A. After he read the counts.
Q. And you pleaded guilty to those counts?
A. Yes.
Q. All right. Now, so that when you told Mr. White, when he asked you "Was the indictment read to you?" and you said "No, sir," you were mistaken. You happen to recall about the United States attorney reading the two counts, is that right?
A. That is right.
Q. What else did the judge say to you? Did he ask you what your plea was, or did he say "Do you plead guilty or not guilty?"

A. He asked, at first, how I wished to plead.

Q. What was your response?

A. I replied, "Guilty."

Q. Then what did the judge say?

A. The United States Attorney, at that time, got up and read off the count No. 1, if I remember right.

Q. Did the judge ask what the plea was?

A. He asked what the plea was, and I replied "Guilty."

Q. Then he read count 2?

A. And the United States attorney read count 2.

Q. And the judge asked you what your plea was on that?

A. Yes.

Q. And you replied—

A. (Interrupting). I hesitated, and he instructed that any one who was guilty of any part of it, was guilty of all.

Q. What did you say then?

A. I pled guilty.

[fol. 77] Q. Did the judge say anything to you—ask you if you had an attorney?

A. No, sir.

Q. Did the clerk ask you if you had an attorney?

A. No, sir.

Q. No one asked you if you had an attorney?

A. No, sir.

Q. Was anything said at all by the judge or by the clerk about an attorney?

A. No, sir.

Q. The word "attorney" was not mentioned at any time?

A. Not to me.

Q. Did you hear the word "attorney" in connection with any of the other prisoners?

A. No, sir.

Q. How long did this hearing last that you had there?

A. Approximately fifteen minutes.

Q. Did the judge ask you if you had anything to say before he sentenced you?

A. Yes, sir.

Q. Did you have anything to say?

A. I replied, "Nothing."

Q. You engaged counsel in these habeas corpus proceedings, did you not?

A. Yes, sir.

Q. Did you use funds that you had on deposit in the prison for that purpose?

A. No, sir.

Q. At all events, you did not use funds you had on deposit here in the prison?

A. No, sir.

Q. You say you had approximately \$20.00 on your person at the time you were in Kansas City?

A. At the time I was in Fargo.

Q. At the time you were in Fargo you had \$20.00?

A. Yes, sir.

Q. Did you have more than that?

A. No, sir.

Q. Did you talk over your case in Kansas City with relation to the Fargo case?

A. No.

Q. You didn't discuss your guilt or innocence at all with him?

A. No, sir.

[fol. 78] Q. Not at any time?

A. No, sir.

Q. Did you ask him for any advice as to what you should or should not do?

A. No sir; I left that to him.

Q. You did discuss it with him, then, did you?

A. Not about my guilt or innocence, no.

Q. You did not discuss that with him?

A. No, sir.

Q. You didn't discuss the Fargo case at all with him?

A. No, sir.

Q. And you didn't discuss the robbery with him?

A. No, sir.

Q. You paid him a fee?

A. Yes.

Q. How much did you pay him?

A. \$100.00.

Q. Am I to understand you didn't talk to him at all about the offense with which you were charged?

A. The talk was about extradition.

Q. And nothing else?

A. Yes, sir.

Q. Didn't you discuss any other phase of the case?

A. He understood the case, I suppose; he said I had been indicted.

Q. You saw him before you were indicted?

A. Yes, sir.

Q. What did you talk about then?

A. He asked me if I could get any witnesses.

Q. For what?

A. To appear at the extradition hearing.

Q. What kind of witnesses?

A. I don't know what kind he meant.

Q. You didn't know what kind he meant?

A. He didn't state.

Q. Didn't you ask him what kind?

A. I suppose he meant witnesses that I would prove I was not in the bank robbery at any time.

Q. Then you did discuss the bank robbery, didn't you?

A. The discussion was mostly about the extradition hearing.

Mr. Williams: May we have a recess for a few moments?

(At this point a five minute recess was taken.)

[fol. 79] Mr. Zirpoli:

Q. Tell me what you understood when your attorney talked to you about witnesses.

A. I understood him to inquire if I had anybody to witness that I was at a different place than what I was charged with.

Q. Then you did talk to him about the robbery?

A. To that extent, yes.

Q. To what extent did you talk to him about it?

A. Concerning witnesses.

Q. Didn't you talk to him about the offense at all?

A. Only about witnesses.

Q. Didn't you talk to him about yourself and the offense?

A. I told him I wasn't guilty.

Q. You told him you weren't guilty?

A. Yes, sir.

Q. Why did he ask you about witnesses to show you weren't at the scene of the crime? Is that what you mean?

A. Yes.

Q. Then you must have told him you weren't there.

A. I told him I wasn't guilty.

Q. Did you tell him that you weren't guilty?

A. Yes.

Q. You told him you weren't guilty; and you told him you weren't there?

A. Yes.

Q. What else did you tell him about this robbery, or your innocence in connection with it?

A. I told him I was in Minnesota at the time.

Q. I beg your pardon?

A. I told him I was in Minnesota at the time.

Q. Did you give him the names of any witnesses to show you were in Minnesota?

A. No.

Q. Didn't he tell you then he didn't believe you?

A. No, sir.

Q. What else—what other conversation did you have with him about this?

A. The first conversation I had with him was concerning [fol. 80] money.

Q. About the robbery—have you told me everything you discussed with him, in so far as the offense was concerned?

A. As far as I remember.

Q. And when the indictment was returned, he advised you to consent to a removal, waive extradition?

A. He advised me he couldn't do anything for me; that I might as well go to North Dakota.

Q. He advised you that you might as well go to North Dakota?

A. Yes, sir.

Q. Did you have any conversation with him at all as to what you should do in North Dakota?

A. No, sir.

Q. None whatsoever?

A. No, sir.

Q. Did you have any conversation with him in relation to your guilt or innocence after the indictment was returned?

A. No, sir.

Q. Did you have any conversation with him at that time as to whether or not you were at the scene of the crime?

A. To what time do you refer to?

Q. Under the charge, the indictment was returned, charging you with certain acts, didn't it?

A. Yes.

Q. The attorney discussed those charges with you, didn't he?

A. He came to the county jail and told me he understood I was indicted; and that as long as I had been indicted, I might as well go to North Dakota.

Q. Did he tell you what you were indicted for?

A. No.

Q. He did not?

A. No.

Q. He didn't tell you anything about the indictment or the charges?

A. It was read partly to me that I was charged with bank robbery, in front of the Commissioner.

Q. What was read to you?

[fol. 81] A. I don't know; he read these charges.

Q. Did you persist, even then, to tell him you were in Minnesota?

A. To tell who?

Q. Your attorney. Didn't I understand you to say—

A. (Interrupting:) Yes.

Q. Did you recall you were in Minnesota during all this time?

A. I told him once.

Q. What did you tell him after that?

A. He didn't ask me again.

Q. Am I to understand that, despite your insistence that you were in Minnesota, he told you to go back, that there was nothing he could do for you after the indictment was returned?

A. That is what he told me.

Q. Didn't he tell you that the fact that you weren't at the scene might make a difference as to whether you could be removed?

A. No, sir.

Mr. White: That wouldn't make any difference.

Mr. Zirpoli: It might or might not. I am pretty sure, if you were going to defend a man, and he wasn't there, I don't think he would be removed if Mr. White were representing him.

Q. And that is the extent, then, of your conversation—he just told you to go back?

A. As I remember, it was.

Q. And nothing at all was said as to what you should do after you got there?

A. No, sir.

Q. He gave you no advice of any kind or character in that case?

A. No, sir.

Q. Now, you got back, and you told us what happened in court. Is there anything else you remember now that happened in court that you haven't told us already?

A. In connection with my case?

Q. Yes.

A. No.

[fol. 82] Q. Did anything happen in court in connection with your case, that you think is material here?

A. Two or three fellows were brought up while I was waiting in court, for sentence. They all pleaded guilty, and they were either paroled or sentenced in some manner. A fellow just previously before I was brought up pleaded guilty and when he received a five year sentence he wished to withdraw his plea and the judge refused to consider it.

Q. Then what happened?

A. That is as far as I remember of other cases besides by own.

Q. That happened before you entered your plea, didn't it?

A. Yes.

Q. You said, with relation to your education, that you had a year in high school?

A. Yes, sir.

Q. Is that the extent of your education?

A. My formal education.

Q. Getting back to your informal education, what other education have you had, other than this formal education that you spoke of?

A. I have done considerable of reading on scientific subjects, and fiction.

Q. Tell me what you have read—just the general subject matter.

A. You mean in the fiction line, or science?

Q. Both. Just generally—you don't have to name particular books—You have read scientific books?

A. Yes.

Q. What kind?

A. Books on mechanics, and some on physics; in fact, there are a number of books in my cell on various college courses.

Q. Various what?

A. College courses.

Q. Have you had some of this education before your arrest?

[fol. 83] A. I have read off and on, mechanics books, and so forth.

Q. You have read fiction books?

A. Yes.

Q. What type of books had you read?

A. Nearly all types of fiction books, I suppose.

Q. I mean, did you read any classics?

A. A few.

Q. Some of the few novels?

A. Yes.

Q. Have you read any Shakespeare?

A. Yes, sir.

Q. This was all before your arrest, we are talking about now, before your Fargo incident?

A. Yes, sir.

Q. Now, Mr. White asked you if any members of your family were attorneys, and you answered they were not. How many are there in your family?

A. My father and mother; and I have three sisters; and a brother.

Q. What do your sisters and your brother do?

A. One sister is a bookkeeper here in California, of some sort; and the other two sisters are married—housewives.

Q. And your brother?

A. My brother is a garage worker.

Q. What does your father do?

A. He has been a salesman most of his life.

Q. Mr. White asked you about the number of times you had been in court, and you told us you had been in court in Hudson, Wisconsin.

A. Yes.

Q. And of being in court in Fargo, North Dakota. These were all prior to this arrest. Then, an arrest in Oklahoma. Where was that?

A. A little town named Drumright.

Q. Was that a state offense?

A. I was charged with vagrancy.

Q. What happened in that case?

A. I was taken up in front of a man—I don't know who he was—and asked if I was guilty or not guilty; and I said I didn't understand, what was vagrancy; and he read "No visible means of support, and soliciting alms," and I said "Not Guilty."

[fol. 84] Q. Then what happened?

A. And he said, "ten days, or \$19.95."

Q. That was after you said "Not Guilty"?

A. Yes, sir.

Q. You weren't represented by an attorney?

A. No.

Q. At least, you had enough intelligence to have him read off the charge and tell you what it was; and he explained the charge to you?

A. I told him I didn't understand the vagrancy charge.

Q. How old were you then?

A. 16 years old.

Q. Was that the first time you had ever been arrested?

A. Yes.

Q. How many times have you been arrested since then?

A. I have been picked up several times.

Q. Approximately how many times all told?

A. About six or eight, I imagine.

Q. And of those six or eight times, how many times did you appear in court?

A. On two occasions.

Q. Two other occasions?

A. Two occasions, including all of them.

Q. In other words, other than the Wisconsin and Fargo, North Dakota, you haven't been in court on any other occasions?

A. No.

Q. What was that extradition proceeding in Fargo, North Dakota?

A. I was in extradition on a Wisconsin charge.

Q. On the same charge on which you later appeared in court in Hudson?

A. Yes.

Q. What was the charge?

A. Larceny.

Q. You were represented by an attorney at that time?

A. In Fargo, North Dakota?

Q. Yes.

A. Yes.

Q. And also an attorney in Hudson, Wisconsin?

A. Yes.

[fol. 85] Q. And those attorneys were employed by you?

A. Yes.

Q. We covered all the court appearances that you have made?

A. Yes.

Q. And were you sentenced on that Wisconsin charge?

A. Yes.

Q. And how much of a sentence did you get?

A. One to ten years.

Q. And you served that in the state penitentiary?

A. Six months in the state penitentiary; and three years in the reformatory.

Q. I presume the first time you ever heard about an attorney being appointed for you, was here at Alcatraz?

Mr. White: He wasn't appointed.

Mr. Zirpoli: All right.

Q. I presume that was the first time you ever heard about that?

A. No, sir.

Q. When did you first hear about it?

A. I have seen in the paper a time or two about a Public Defender in murder charges; and in my opinion, that was the only one for appointing without funds.

Q. You heard about Public Defenders—did you ever hear about them before?

A. Before what time?

Q. About other than Public Defendants on other than murder charges?

A. No, sir.

Q. And you have read about this in the newspapers. When did you first learn you could have someone defend you, if you didn't have funds, in charges other than murder?

A. After I read the Johnson versus Zerbert case.

Q. When did you read that?

A. Here in prison.

Q. You didn't know anything about it before that?

A. No.

Q. Can you give me a citation on that?

A. The number of it?

[fol. 86] Q. Yes.

A. It came out in the 53rd or 55th Supreme Court Reporter.

Q. While you were serving time in the reformatory in Wisconsin, did you go to school there?

A. No.

Q. Did you get any schooling at all in the reformatory?

A. No, sir; with the exception of a course in automobile

mechanics, which I took from the Wisconsin University Extension Division.

Q. Which was given by the Extension Division?

A. Yes, sir.

Q. Getting back to Angus Kennedy, who did you say he was?

A. The Deputy Marshal.

Q. He took you by plane?

A. Yes.

Q. How long were you with him altogether?

A. The trip took about nine hours to Seattle from Fargo, North Dakota.

Q. Did you discuss your case with him?

A. No, sir.

Q. You didn't discuss it at all?

A. I couldn't on the airplane; too much noise was made.

Q. How did you get down to the plane?

A. I came to the air field in a machine; and in Seattle I was put in a taxi by the Deputy; and there was a girl they picked up.

Q. How much conversation did you have with Kennedy at any time?

A. The only conversation I remember having with him was immediately after my trial, leaving the court room. He asked me if I didn't know of a second charge until it was read. I told him, "No, the first time I heard of it."

Q. Didn't your attorney tell you, after the indictment was returned, that there were two charges?

A. No, sir.

Q. Am I to understand you had no conversation whatsoever with Angus Kennedy about your case, other than that statement you just gave me about the second charge? [fol. 87] A. I asked him, while we were waiting, in the discussion, to see my papers—my commitment papers—and he showed them to me, and—

Q. What did he say about your papers?

A. Nothing. I handed them back to him.

Q. Did you ask him about your sentence?

A. No.

Q. Did you ask him about how much time you would have to serve?

A. No.

Q. Did you know at that time anything in relation to

each one of your sentences—did you know how much time you would have to serve?

A. I had no idea.

Q. Did you know how much you would have to serve before being eligible for parole?

A. No.

Q. You would say you did not have any conversation with Mr. Kennedy in which you stated you had been promised by the Government agent that in the event you pleaded guilty you would receive a sentence not to exceed 25 years?

A. No.

Q. Did you ever say that to Mr. Kennedy?

A. No, sir.

Q. Did you say that since the sentences you had received were running consecutively, the most you would have to serve would be the 10 year sentence, and a required portion of the 15 year sentence, before you would be eligible for parole?

A. No, sir.

Q. Did you tell Mr. Kennedy that you had no use for an attorney?

A. No, sir.

Q. Did you tell him you would have been satisfied if you had received the sentence promised you?

A. No, sir.

Q. Did you tell him you would not stand trial because you feared certain things might develop that might not be to the best interests of yourself?

A. No, sir.

Q. And did you say to him, "I knew I would get the book thrown at me"?

A. No, sir.

[fol. 88] Q. Getting back to these two agents, to whom you made the statement, what promises did they make to you? What statements did they make to you?

A. They made the statement that if I wouldn't plead guilty, they would see that I got 80 years, or more time.

Q. How did they compute those 80 years.

A. They marked down 25, 25, 10 and 10 and 10 on a piece of paper.

Q. Did they tell you what the charges were?

A. No.

Q. They did not?

A. No, sir.

Q. They just marked down on a piece of paper those numbers?

A. Yes.

Q. Which of the agents marked it down on a piece of paper?

A. The agent who told me that he was from Aberdeen, South Dakota.

Q. He was the one who marked it down?

A. Yes.

Q. Where was the other agent while he was marking it down?

A. Sitting at the table.

Q. He listened to this conversation?

A. Yes.

Q. What did you say when they said all this to you?

A. I don't remember exactly what I did say, or if I said nothing.

Q. Had you already told them you were guilty?

A. No, sir.

Q. You hadn't confessed that yet?

A. No.

Q. Had you signed a waiver?

A. No.

Q. Had you already been told by your attorney that you should do so?

A. I was told by my attorney that he couldn't do anything for me—that I might as well go.

Q. Do I understand that all the agent did was put down these numbers and not say anything in connection with them?

[fol. 89] A. He told me that was the amount of time I would get if I didn't sign a statement.

Q. For what charges?

A. He didn't mention the charges.

Q. Of any kind or character?

A. No, sir.

Q. What did you have to say to all that, that he would see to it that you would get 80 years?

A. I don't remember.

Q. Did you think you would get 80 years?

A. I don't know.

Q. Did you have in mind anything that would cover the sentences listed there?

A. He explained that all these 10 years were to be for the various state lines that I crossed.

Q. He did tell you something, then. He said because of the various state lines that you crossed, you would get a ten year sentence. What else did he say about that?

A. He said that if I would sign a waiver and a statement he would recommend that I would get only ten years.

Q. What did you say?

A. I don't remember exactly; but to the best of my knowledge, I told him if I signed a statement, I wouldn't know anything about anybody, and I wouldn't sign a statement which would involve anybody else.

Q. Then you did confess your own guilt?

A. I signed a statement.

Q. Did you just sign a statement? What was your purpose in signing the statement?

A. I was given the choice between either signing the statement, or receiving all this time.

Q. You knew you wouldn't receive the time unless they proved the case against you, didn't you? You knew that.

A. I imagine they would have to put some charges against me to get this time.

Q. And you knew they had to prove it?

[fol. 90] A. I didn't know what charges they could put against me; I didn't know how much time I could get.

Q. You were a man of intelligence. You knew exactly what they had to do in order to send you to the penitentiary?

A. I knew from previous experience that I would have to be convicted before I was sentenced.

Mr. Zirpoli: That is all.

Mr. Williams:

Q. How old are you now, Mr. Holiday?

A. 36; nearly 37.

Q. Do you recall what the first count was?

A. I was charged in the words of the statute, "Taking by force, fear and violence—a certain sum of money."

Q. Do you recall what the second count was?

A. The second count, as I recall it from the indictment, was that in committing the first offense, I put in jeopardy the lives of the bank officials.

Mr. Zirpoli:

Q. Those were the counts read to you?

A. Yes.

Mr. White:

Q. You signed the statement before the Government agents at Kansas City, on the representations that they would use their best efforts in obtaining for you a sentence of not more than 10 years, is that correct?

A. Yes, sir.

Q. And in signing that statement and the waiver, the agent also threatened you with imprisonment to the extent of 80 years, unless you did sign the waiver and the statement of your implication in the crime for which you were taken to Fargo, North Dakota?

A. Yes, sir.

Mr. Zirpoli:

Q. They secured a confession from you, is that it?

A. Yes, sir.

Q. But they didn't discuss your plea with you, did they? They didn't discuss your plea, whether you should plead guilty or not guilty; they didn't discuss that at all?

[fol. 91] A. The discussion was about the statement I should sign for them.

Mr. White:

Q. At the proceedings in Fargo, North Dakota, there was an agent there to make a recommendation to the Court for leniency in your behalf, was there?

A. No, sir; the agent there told the Court that I was sentenced to two institutions previously.

Q. In other words, the agent gave the Court a statement of your prior arrests, convictions and terms of imprisonment; but made no statement on your behalf to the Court, recommending leniency?

A. No, sir.

Q. And you are definite and positive that the judge, who presided in court at Fargo, North Dakota, Judge Miller, did not advise you of your right to have counsel, providing you did not have funds with which to secure counsel for yourself.

A. He did not.

Mr. Zirpoli:

Q. When you say the agent told the Court about the two institutions, you referred to the sentences you received for vagrancy, and the Wisconsin sentence?

A. To the Wisconsin sentence alone.

Q. And he mentioned the two institutions in which you served time in Wisconsin?

A. Yes.

Mr. Zirpoli: That is all.

Mr. White:

Q. Have you anything else to say, Mr. Holiday?

A. I don't think so.

Mr. Williams: Do you want it to go to a date?

Mr. Zirpoli: Yes.

Mr. Williams: To what date?

Mr. Zirpoli: I would suggest, if there are stipulations that will take the place of a deposition, that would be all right.

Mr. White: I think the findings should be drawn, on the basis of evidence of record.

[fol. 92] Mr. Zirpoli: February 15. I may want to put in some testimony here. I want the testimony of the agent. I will admit I have the testimony of Mr. Kennedy.

Mr. White: That is too much time.

Mr. Williams: Perhaps we had better make it January 15.

Mr. Zirpoli: You can make it January 15, and I will try and get it in; but I won't promise. I have to locate the agents and get their depositions.

Mr. Williams: All right. January 15, 1940.

[fol. 93] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Present: The Honorable Martin I. Welsh, District Judge

No. 22940

FORREST HOLIDAY

VS.

JAMES A. JOHNSTON, Warden, U. S. Penitentiary, Alcatraz, California

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS—
July 1, 1940

The report of the United States Commissioner came on regularly this day to be heard.. Thos. C. Lynch, Esq., Assistant United States Attorney, was present on behalf of Respondent. No appearance was made for or on behalf of the Petitioner. After hearing Mr. Lynch, It Is Ordered that said Report of the Commissioner be and the same is hereby approved, that the application for a Writ of Habeas Corpus be and the same is hereby denied, and that said Writ be and the same is hereby discharged.

[fol. 94] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS—Filed
August 1, 1940

To the Honorable Martin I. Welsh:

Now comes the petitioner, Forrest Holiday, and moves the Court for leave to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the Court in the above cause denying a writ of habeas corpus and dismissing the petition therefor.

This appeal will be prosecuted upon the following assignments of error:

(a) The Court erred in not issuing a writ of habeas corpus.

(b) The Court erred in holding that the petitioner competently and intelligently waived his Constitutional right to the assistance of counsel.

(c) The Court erred in holding that it could hear evidence of facts that were sworn to have occurred after sentence of petitioner.

(d) The Court erred in holding that, where two sentences for different amounts, to-wit: ten years on one count and fifteen years on the other count of the indictment to run consecutively, both sentences are not void on their face because of their violation of the jeopardy clause of the Fifth Amendment.

(e) The Court erred in holding that any admissible evidence whatever was adduced against petitioner.

Petitioner is a citizen of the United States and cannot, because of his poverty, prepay the costs of this appeal or guarantee security therefor, and he sincerely believes he is entitled to the relief sought.

Brief and memorandums having been filed before the Court in the above cause, and the Court having written no opinion to overcome the authorities cited, it is unnecessary to further argue the cause here to establish good faith on appeal.

"There can be no doubt that the action of the District Court, as set forth in its order and judgment *refusing to* [fol. 95] *issue the writ*, was, *so far as an appeal was concerned*, equivalent to a refusal to discharge the prisoner on a hearing on a return to the writ; and that, under section 1019 of the Revised Statutes, an appeal lies to this Court from that order and judgment." (Italics added.)

In re Snow, 120 U. S. 274.

Wherefore petitioner prays leave to appeal in forma pauperis under the provisions of Title 28 U. S. C. Section 832.

Forrest Holiday, Petitioner.

STATE OF CALIFORNIA,
County of San Francisco, ss:

Sworn and subscribed to before me this 30 day of July, 1940.

E. J. Miller, Associate Warden; United States Penitentiary, Alcatraz, California.

Records at U. S. Penitentiary, Alcatraz, California; Indicate that Forrest Holiday is a citizen of the United States.

Forrest Holiday, Register Number 422-AZ has on deposit in the Prisoners' Trust Fund, the sum of \$18.85.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[File endorsement omitted.]

[fol. 96] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

[Title omitted]

ORDER DENYING APPEAL IN FORMA PAUPERIS—Filed August 12, 1940

In his application for a writ of habeas corpus, petitioner makes two contentions. First, that at the time he pleaded guilty to the indictment returned against him in the South-eastern Division of the District of North Dakota, he was deprived of his constitutional right to the assistance of counsel for his defense. Second, that the two counts of the indictment stated the same offense and that his conviction and sentence on both counts constituted double jeopardy.

As to the second contention, it appears that his sentence of ten years under the first count has not expired. The rendition of this sentence for the offense charged in said count was within the jurisdiction and power of the court imposing it, and this application for a writ of habeas corpus based on any alleged invalidity of the sentence imposed under the second count is premature and cannot be considered. *McNally v. Hill*, 293 U. S. 131; 55 Sup. Ct. 24.

[fol. 97] As to petitioner's other contention, that he was deprived by the sentencing court of his constitutional right to the assistance of counsel for his defense. A writ of habeas corpus was issued herein, returnable before Ernest E. Williams, United States Commissioner. A full hearing

was held at Alcatraz Penitentiary, and the report, findings and recommendation of the Commissioner are on file herein. After an examination of the transcript of the proceedings had at this hearing, the testimony of the petitioner, the evidence presented by the respondent and the record filed as a part of the return, this court determined that petitioner had failed to sustain the burden imposed on him of proving that he was deprived of his constitutional right to the assistance of counsel for his defense and that the evidence amply supported the finding of the Commissioner that the petitioner competently and intelligently waived his right to the assistance of counsel; and adopting and approving the report, findings and recommendation of said United States Commissioner, the writ was discharged.

For the reasons hereinabove set forth,

It Is Hereby Certified, that in the opinion of the undersigned, there is no merit in the application for appeal now before the court, and said appeal in forma pauperis is therefore Denied.

Dated: August 12, 1940.

Martin I. Welsh, United States District Judge.

[File endorsement omitted.]

[fols. 97-A-100] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 101] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. —

FORREST HOLIDAY, Petitioner

vs.

MARTIN I. WELCH, Judge of the United States District
Court for the Northern District of California, Southern
Division, Respondent

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS IN
FORMA PAUPERIS—June 20, 1940

To the United States Circuit Court of Appeals for the
Ninth Circuit:

Now comes the petitioner, Forrest Holiday, and applies
for leave to file a petition for a writ of Mandamus sub-

mitted herewith in forma pauperis under the provisions of 28 U. S. C. section 832.

Petitioner therefore alleges on his oath:

That because of his poverty, he cannot prepay the costs of filing or other fees in the above action; that he sincerely believes he is entitled to the relief sought; and that he is a citizen of the United States.

Forrest Holiday, Petitioner, Alcatraz, Calif.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Forrest Holiday is a citizen of the United States.

Forrest Holiday, Register Number 422AZ has on deposit in the Prisoners' Trust Fund, the sum of \$22.59.

Sworn to and subscribed on this 18 day of June, 1940,
E. J. Miller, Associate Warden, U. S. Penitentiary,
Alcatraz, Calif. Warden-Associate Warden au-
thorized by the Act of February 11, 1938, to ad-
minister oaths. (Seal.)

[fol. 102] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

[Title omitted]

PETITION FOR WRIT OF MANDAMUS

To the United States Circuit Court of Appeals for the Ninth
Circuit:

Application is here made, by the petitioner Forrest Holiday, for a writ of Mandamus addressed to the Honorable Martin I. Welch, Judge of the United States District Court for the Northern District of California, Southern Division, commanding him to perform his official duty under the Statutes and the law of the United States, made and provided in such case, and thereby proceed without further delay and bring to a conclusion petitioner's habeas corpus action in the above named District Court, No. 22940-W.

Jurisdictional Statement

This Court has jurisdiction to issue a writ of Mandamus in aid of its Appellate jurisdiction. 28 U. S. C. section 377.

Statement of Facts

A brief summary of the facts on record are as follows:

Petition was sworn to and signed before a Notary Public (Associate Warden) on February 4th, 1939, by petitioner. Due to institutional regulations, filing fee for petition was not sent or received by the Clerk of the District Court until March 3rd, 1939, on which date petition was filed and assigned the number—22940-L.

Petitioner, by letter, requested time for counsel to prepare a brief. Judge Louderback granted a delay for this purpose also an additional delay requested by Stephen M. White, counsel employed for petitioner during the first stay in the proceedings, was granted by Judge Louderback. [fol. 103] Thereafter, Judge Louderback issued an order to show cause and set the date of July 10th, 1939, for a return and hearing on said order to show cause.

On July 10th, 1939, Judge St. Sure, setting for and in behalf of Judge Louderback, granted a stay of two weeks to allow counsel for petitioner time to prepare and file an answer to the return made by the respondent. Judge St. Sure subsequently caused the case to be transferred to Judge Martin I. Welch.

At Judge Welch's direction, additional Memoranda was filed by petitioner's counsel on August 10th, 1939.

On or about December 9th, 1939, Judge Welch granted the above named petition No. 22940-W, the same being returnable at Alcatraz, California, on December 16th, 1939. This date being tentative, was changed to December 19th, 1939.

At the hearing on December 19th, 1939, before Commissioner Williams, petitioner did testify, as required by law, and at its conclusion the date of January 15th, 1940 was agreed upon as ample time for the filing of additional evidence on behalf of the respondent. For reasons, at this time unknown to petitioner, this additional evidence was not submitted to Commissioner Williams until April 30th, 1940.

As petitioner is advised and believes, no further move has been made by Judge Welch or Commissioner Williams to bring to a conclusion this action pending for many months in the District Court.

Points and Authorities

As this petitioner is advised and believes, the following are applicable to Mandamus.

I

Where the District Court Judge refuses to act in an action in his Court when the moving party has a present right to such action, Mandamus lies on the ground that such refusal to act obstructs and interferes with appellate power.

Frankel v. Woodrough, (C. C. A. 8) 7 F. (2nd) 796.

McNinch v. Heitmeyer, (D. C. App.) 105 F. (2nd) 41, 43.

Marbury v. Madison, 1 Cr. 137, 175.

II

"It is elementary law that Mandamus will only lie to enforce a ministerial duty, as contra-distinguished from a duty which is merely discretionary"

United States ex. rel. International Contracting Co. v. Lamont, 155 U. S. 303, 308.

[fol. 104]

Prayer

Wherefore, good cause appearing, petitioner prays that an order to show cause why a writ of Mandamus should not issue be directed to the aforesaid Judge Welch as to all the matters of this petition, and prays that a writ of Mandamus issue to said Judge Welch commanding him to proceed without further delay to make a final order in said habeas corpus action No. 22940-W. after finding the facts from the evidence and stating the conclusions of law.

Forrest Holiday, Petitioner, Alcatraz, Calif.

S-or-n to and subscribed on this 18 day of June, 1940.

E. J. Miller, Associate Warden, U. S. Penitentiary, Alcatraz, Calif. Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths. (Seal.)

[fol. 105] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR LEAVE TO FILE PETITION FOR
WRIT OF MANDAMUS—Filed July 16, 1940

Upon consideration of the motion of the petitioner for leave to file petition for writ of mandamus directed to the above named respondent, and it appearing to the Court that the petition for writ of habeas corpus referred to therein was denied by the trial court on July 1, 1940, It Is Ordered that said petition for leave to file petition for writ of mandamus be, and hereby is, denied.

Curtis D. Wilbur, Francis A. Garrecht, William Healy, United States Circuit Judges.

Dated: San Francisco, California. July 16, 1940.

[File endorsement omitted.]

[fol. 106] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

PETITION FOR LEAVE TO APPEAL IN FORMA PAUPERIS AFTER
DENIAL OF SUCH LEAVE IN THE DISTRICT COURT—August
27, 1940

Forrest Holiday, Register Number 422-AZ has on deposit in the Prisoners' Trust Fund, the sum of \$16.32.

To the United States Circuit Court of Appeals for the Ninth Circuit:

Application is here made by the petitioner, Forrest Holiday, for leave to appeal in forma pauperis in the above cause after the Honorable Martin I. Welch, on the twelvth day of August, 1940, denied such leave to Appeal. The decision denying leave to appeal is set forth in the appendix annexed hereto. Said appeal was applied for on the following errors:

Assignment of Errors

(a) The Court erred in not issuing a writ of habeas corpus.

(b) The Court erred in holding that the petitioner completely and intelligently waived his constitutional right to the assistance of counsel.

(c) The Court erred in holding that it could hear evidence of facts that were sworn to have occurred after sentence of petitioner.

(d) The Court erred in holding that, where two sentences for different amounts, to-wit, ten years on one count and [fol. 107] fifteen years on the other count of the indictment to run consecutively, both sentences are not void on their face because of their violation of the jeopardy clause of the Fifth Amendment.

(e) The Court erred in holding that any admissible evidence whatever was adduced against petitioner.

Cause for Appeal

Said decision of the Honorable Martin I. Welch, which is quoted in the appendix, denied the appeal on the implied ground that the decision of the District Court is final. The District Court did not say that the appeal was sought without good faith, but that, "in the opinion of the undersigned, there is no merit in the application for the appeal," so holding arbitrarily in violation of the due process of law clause of the Fifth Amendment to the Constitution.

Petitioner has given no notice of Appeal.

Brief, Memorandum and evidence were before the District Court, and a motion in diminution of the records is filed herewith, so that this Court may have the entire proceeding before it for consideration.

Petitioner is a citizen of the United States and cannot, because of his poverty, prepay the costs of this appeal or guarantee security therefor, and he sincerely believes he is entitled to the relief sought.

Wherefore, good cause appearing therefor, petitioner prays leave to appeal in forma pauperis under the provisions of 28 U. S. C., section 832.

Forrest Holiday, Petitioner.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Forrest Holiday is a citizen of the United States.

STATE OF CALIFORNIA,
County of San Francisco:

Subscribed and sworn to before me this 24 day of
August, 1940. E. J. Miller, Associate Warden,
United States Penitentiary, Alcatraz, California.
(Seal.)

Warden-Associate Warden authorized by the Act of Feb-
ruary 11, 1938, to administer oaths.

[fol. 108] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

MOTION IN DIMINUTION OF RECORDS

To the United States Circuit Court of Appeals for the
Ninth Circuit:

Now comes the petitioner, Forrest Holiday, and gives
five days notice to James A. Johnston, Warden, U. S. Peni-
tentiary, Alcatraz, California, and to Frank J. Hennessy,
United States Attorney, that at ten o'clock A. M., on the
3rd day of September, 1940, petitioner will appear in the
above court in its Courtroom in the Postoffice and Courts
Building, Seventh and Mission Streets, San Francisco, Cali-
fornia, and then and there move the Court to issue a writ
of Certiorari in diminution of the record in the above cause
in the District Court, so that, in connection with the appli-
cation for leave to appeal filed herewith, the Court may
consider the record in the Court below.

Forrest Holiday, Petitioner.

STATE OF CALIFORNIA,
County of San Francisco, ss:

Subscribed and sworn to before me this 24 day of
August, 1940. E. J. Miller, Associate Warden,
United States Penitentiary, Alcatraz, California.
(Seal.)

Warden-Associate Warden authorized by the Act of Feb-
ruary 11, 1938, to administer oaths.

[fols. 109-110] Appendix omitted. Printed side page, 96
ante.

[fol. 111] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of the Application of FORREST HOLLIDAY for
leave to appeal in forma pauperis.

Before Wilbur, Mathews and Healy, Circuit Judges.

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL IN FORMA
PAUPERIS—Filed September 5, 1940

Application for leave to appeal in forma pauperis is
denied.

Curtis D. Wilbur, Clifton Mathews, William Healy,
United States Circuit Judges.

[File endorsement omitted.]

[fol. 112] Clerk's certificate to foregoing transcript
omitted in printing.

[fol. 113] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 3, 1941

The Petition herein for a writ of certiorari to the United
States Circuit Court of Appeals for the Ninth Circuit is
granted.

And it is further ordered that the duly certified copy of
the transcript of the proceedings below which accompanied
the petition shall be treated as though filed in response to
such writ.

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FILE COPY

Office - Supreme Court, U. S.
FILED

MAR 3 1941

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 14, Original

FORREST HOLIDAY,

Petitioner,

vs.

**JAMES A. JOHNSTON, WARDEN, UNITED STATES PENI-
TENTIARY, ALCATRAZ, CALIFORNIA.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

FORREST HOLIDAY,

Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 14, Original

FORREST HOLIDAY,

Petitioner,

vs.

**JAMES A. JOHNSTON, WARDEN, UNITED STATES PENI-
TENTIARY, ALCATRAZ, CALIFORNIA.**

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The petitioner, Forrest Holiday, here applies for a writ of certiorari addressed to the Ninth Circuit Court of Appeals commanding it to certify to the Supreme Court a copy of the record in the above cause for the purpose of having the Circuit Court's decision reviewed in the Supreme Court.

Jurisdiction.

The Supreme Court has jurisdiction to issue a writ of certiorari under the provisions of 28 U. S. C. section 347(a).

Summary of Issues.

The reasons assigned why petitioner believes the writ of certiorari should issue and the decision in the courts below be reviewed are summarized below and more particularly enlarged thereafter:

(a) Habeas corpus is proper remedy where an accused entered plea of guilty to vague if not void indictment without the assistance or waiver of counsel.

(b) Habeas corpus is proper remedy where an accused was sentenced to conflicting sentences to run consecutively on conflicting counts of the indictment.

(c) None of the evidence adduced against petitioner was material, but if material, none was admissible because petitioner was denied right to cross-examine the witnesses.

(d) The District Court has no jurisdiction to issue a writ of habeas corpus returnable before a referee.

Enlargement.

This action first began as a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division at San Francisco. *Re Forrest Holiday on Habeas Corpus*, No. 22940-W.

Subsequent to the filing of petition, on the 3rd day of March, 1940, petitioner employed counsel and amended his petition, adding thereto allegations that he had not competently and intelligently waived the assistance of counsel.

A writ of habeas corpus issued returnable before a United States Commissioner. Petitioner's testimony was taken by said Commissioner in the Federal Penitentiary at Alcatraz, California, on the 19th day of December, 1940. Said Commissioner months afterwards filed with the Court a document he represented to be a finding of facts and conclusions

of law, in which he completely ignored the sentencing court's records themselves as evidence and cited cases not in point with petitioner's case. The District Court adopted the findings of the Commissioner and denied the writ of habeas corpus. Petitioner was unable to obtain a copy of the transcript and most of the testimony. Some of the proceedings petitioner obtained from the Attorney employed and paid to represent him. Said attorney states that he was never given notice the writ of habeas corpus was denied, and petitioner was given no such notice until after he filed mandamus in the Circuit Court to compel action in the court below.

In due time, petitioner applied to the District Court for leave to appeal in forma pauperis, from the order of the District Court's order denying habeas corpus, assigning errors and showing sufficient cause for the appeal. The District Court denied leave to so appeal on the 9th day of August, 1940. Application was immediately made to the Circuit Court for the Ninth Circuit for leave to appeal in forma pauperis and, on the 5th day of September, 1940, leave to appeal was denied. The decision of the Circuit Court reads as follows:

Order:

In the Matter of the Application of FOREST HOLIDAY
for Leave to Appeal in Forma Pauperis.

Before Wilbur, Mathews and Healy, Circuit Judges.

Application for leave to appeal in forma pauperis is denied.

CURTIS D. WILBUR,
CLIFTON MATHEWS,
WILLIAM HEALY,

United States Circuit Judges.

(Endorsed:) Filed September 5, 1940. Paul P.
O'Brien, Clerk.

The order of the District Court denying leave to appeal reads as follows:

Order and Certificate on Allowance of Appeal in
Forma Pauperis.

In his application for a writ of Habeas Corpus, petitioner makes two contentions. First, that at the time he pleaded guilty to the indictment returned against him in the Southeastern Division of the District of North Dakota, he was deprived of his constitutional right to the assistance of counsel for his defense. Second, that the two counts of the indictment stated the same offense and that his conviction and sentence on both counts constituted double jeopardy.

As to the second contention, it appears that his sentence of ten years under the first count has not expired. The rendition of this sentence for the offense charged in said count was within the jurisdiction and power of the court imposing it, and this application for a writ of habeas corpus based on any alleged invalidity of the sentence imposed under the second count is premature and cannot be considered.

McNally v. Hill, 293 U. S. 131, 55 Sup. Ct. 24.

As to petitioner's other contention, that he was deprived by the sentencing court of his constitutional right to the assistance of counsel for his defense. A writ of habeas corpus was issued herein, returnable before Earnest E. Williams, United States Commissioner. A full hearing was held at Alcatraz Penitentiary, and the report, findings and recommendation of the Commissioner are on file herein. After an examination of the transcript of the proceedings had at this hearing, the testimony of the petitioner, the evidence presented by the respondent and the record filed as a part of the return, this Court determined that petitioner had failed to sustain the burden imposed on him of proving that he was deprived of his Constitutional right to the assistance of Counsel for his defense and that the evidence amply supported the finding of the Commissioner that the petitioner competently and in-

telligently waived his right to the assistance of Counsel; and adopting and approving the report, findings and recommendation of said United States Commissioner, the writ was discharged.

For the reasons hereinabove set forth,

It is hereby certified, that in the opinion of the undersigned, there is no merit in the application for appeal now before the Court, and said appeal in forma pauperis is therefore denied.

Dated August 9, 1940.

MARTIN I. WELSH,
United States District Judge.

The Evidence Adduced.

Upon the so called hearing of this case, petitioner was denied his statutory and constitutional right to cross-examine the witnesses of the respondent. However, the evidence was fully sufficient to prove conclusively that petitioner did not competently and intelligently waive the assistance of counsel at the time he entered a plea of guilty.

Evidence for Respondent.

In legal substance, the respondent adduced no evidence whatever. The sentencing Judge deposed that, for years, he had practiced appointing counsel for defendants unable to employ counsel, and that while he could not remember advising petitioner of his right to counsel in this instance, he felt morally certain that he had done so. The United States Attorney testified substantially the same as the sentencing Judge, basing his conclusions on how he felt to a "moral certainty" without knowledge of the actual facts. A deputy United States Marshal, in conflicting statements and un-cross-examined, swore petitioner told him after sentence was imposed that petitioner obtained no counsel because he had no use for one and was afraid of getting

"the book thrown at him"; he so testified from a position in which only he and petitioner were present.

Evidence for Petitioner.

Undisputed, petitioner swore he did not know he had a right to demand assistance of Counsel when he had no money with which to pay the fee, and swore he did not waive the assistance of Counsel.

Undisputed, petitioner swore to facts that Department of Justice Officers intimidated him to sign a statement implicating petitioner in the bank robbery involved, and to plead guilty.

Undisputed, it appears that petitioner plead guilty upon a reading of the indictment, and without ever having possession of the indictment.

Undisputed, it appears that, after petitioner plead guilty to the first count of the indictment, the second count was read and petitioner was asked to plead to it and petitioner "hesitated", whereupon the trial court instructed petitioner that "anyone who was guilty of any part of it (indictment) was guilty of all", which instruction, in substance, was an order of the court for petitioner to plead guilty to count two.

Undisputed, it appears that petitioner was in custody at the time of his plea of guilty.

Undisputed, it appears that petitioner did not understand the charges against him.

Undisputed, it appears that, to say the least, the indictment should have been demurred to, and the petitioner was denied his right to so demur.

Undisputed, it appears that the court itself did not understand the charges and, to say the least, imposed erroneous sentences.

Analysis of Statute.

The indictment, in two counts, was drawn under T. 12 U. S. C. subsection (a) and (b) of Section 588 (b), as amended May 18, 1934, C. 304, Sec. 2, 48 Stats. 783.

The pertinent parts of the statute provide as follows:

"(a) Whoever, *by force or violence* or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever, in committing or attempting to commit, any offense defined in subsection (a) of this section *assaults* any person, *or puts in jeopardy* the life of any person *by the use of a dangerous weapon or device*, shall be fined not less than \$1,000 nor more than \$10,000 or imprisoned not less than five nor more than twenty-five years, or both" (28 U. S. C. Section 588 (b); all italics added).

There are conflicting appellate rules interpreting the above Section 588 (b), subsections (a) and (b). The District of Columbia Court of Appeals holds that subsections (a) and (b) define different and separate crimes; while several Circuit Courts hold that the purpose of the statute is to define one crime of robbery in three degrees, and that where all three degrees are alleged sentence can be imposed on the greatest degree only.

Hewitt v. United States (C. C. A. 8), 110 F. (2d) 1, — where all the cases are listed.

In the *Hewitt* case, *supra*, the court said at page 11:

"We think that the conclusion reached by the Fifth Circuit in the case of *Druett v. U. S.*, *supra* (107 F. 2nd 438, 439) is correct. Congress, in enacting 588 (a) and

588 (c) was dealing with the crime of bank robbery, and not with forcible taking, putting lives in fear, assault, putting lives in jeopardy, killing and kidnapping as distinct crimes. In effect, Congress created three classes of bank robbery according to degree; first, that which was accompanied by force or by putting in fear; second, that which was accompanied by an assault or putting lives in jeopardy; and, third, that which was accompanied by killing or kidnapping. Proof of robbery of the first class would also prove robbery of the second class and proof of robbery of the third class would also prove robbery of both the second and first classes.

"Our conclusion is that robbery of the University bank constituted, for the purpose of the sentence, but one offense, *and that no sentence should have been imposed under the first count of the indictment*" *Hewitt v. U. S. (C. C. A. 8), 1, 11; italics added*).

Assuming but not conceding the validity of the above rule, it appears that no sentence should have been imposed under count one of petitioner's indictment. - In such an instance, it is the duty of the sentencing court (*Fleisher v. U. S.*, 302 U. S. 218) to amend its judgment and fix a date for the second sentence to commence to run.

In petitioner's case, however, the courts below, without mentioning the fact, overruled the *Hewitt* case, *supra*, adopting the District of Columbia Appeal Court rule cited in the *Hewitt* case, *supra*.

Said conflicting decisions, however, are both erroneous as to the true construction of Section 588 (b), *supra*. The punishments provided in each subsection are different, so that, unless the degree theory of construction will stand, subsections (a) and (b) are void.

The following provisions should be weighed:

- (a) "Whoever, * * * by force or violence * * *"
- (b) Whoever, * * * *Assaults* any person or puts

*in jeopardy * * * by the use of a dangerous weapon or device * * **

"Force and violence", as used in subsection (a) are words synonymous in meaning with the words "assaults and puts life in jeopardy by the use of a dangerous weapon or device" as used in subsection (b): One of the best tests of such a construction is to consider any possible instruction to a jury in a case where trial was had on both subsections (a) and (b) on two counts of an indictment drawn as petitioner's is. How could the jury determine from evidence where "force and violence" end and where "assault and jeopardy" begin? The fact is: both "assault" and "jeopardy" are essential elements of robbery, and the greater crime of robbery as defined by subsection (a) includes everything contained in the "assault and jeopardy" of subsection (b), while the lesser crime of "assault and jeopardy" is punishable by a greater punishment than that of the greater crime in which it is an element.

Congress had power to prohibit either robbery or jeopardy. If jeopardy and assault were punishable by less than robbery, there would be no objection to the law. Greater punishment for a single element than that for a whole crime, however, sets up conflicting punishments for the same crime and both punishments are void.

Points and Authorities.

1

Habeas Corpus is proper remedy where an accused plead guilty to vague indictment without the assistance or waiver of counsel.

In *Johnson v. Zerbst*, 58 S. Ct. 1019, the Supreme Court decided habeas corpus to be proper remedy where an accused was convicted without the assistance or waiver of counsel. The *Johnson* case, however, does not decide what

constitutes "an intelligent and competent waiver of counsel". The Supreme Court did say there:

"The determination of whether there has been an intelligent waiver of the right of Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case. * * *" (Johnson v. Zerbst, 58 S. Ct. 1019, 1023.)

The above rule, it will be observed, is a rule of evidence, that is to say, it defined the method of determining whether or not there was a "competent and intelligent" waiver of the constitutional right to counsel. That method is to be applied by other courts in determining whether, at the proper time, the sentencing court heard the issue and determined the facts as to waiver of counsel, and in this connection the Supreme Court said:

"(4) The Constitutional right of an accused to be represented by counsel *invokes of itself, the protection of a trial court.* * * * This protecting duty imposes the serious and weighty responsibility upon the *trial judge* of determining whether there is an intelligent and competent waiver by the accused". (Johnson v. Zerbst, 58 S. Ct. 1019, 1023; italics added.)

In other words, a petition for habeas corpus, a complete collateral attack, operates exactly as an appeal; the reviewing court is not authorized to inquire into any matter which was not before the sentencing court, that is to say, habeas corpus does not authorize a new trial of the issue of whether proper waiver of counsel was made, but reviews the trial of that issue as it was tried in fact by sentencing court. Over and over again habeas corpus is held to be of such a nature. In *Johnson v. Zerbst, supra*, the Supreme Court said:

"* * * the petitioned Court has 'power to inquire with regard to the jurisdiction of the inferior Court,

either in respect to subject matter or to person, even if such inquiry (involves) an examination of *Facts outside of, but not inconsistent with the record.*' In re Mayfield, 141 U. S. 147; In re Cuddy, 131 U. S. 280." (Johnson v. Zerbst, 58 S. Ct. 1019, 1024; *italics added.*)

"Facts outside of but not inconsistent with the record", within the meaning of the above rule, limits habeas corpus to a trial *de nova* of jurisdiction. The record itself—that is to say, all the proceedings, findings, and evidence on which the findings were based—must stand for what they are worth, without being enlarged or extended by additional proof of the same facts tried or disproof of those facts.

In this habeas corpus action, for instance, petitioner alleged that no proceedings were had in the court of first instance relative to waiver of counsel and (2) that petitioner himself had no knowledge of the law. The court of first instance, when making no inquiry into the subject matter of waiver of right to counsel, cannot be said to have found, on evidence, that petitioner "competently and intelligently waived his right to Counsel" in the meaning of *Johnson v. Zerbst, supra*. Where "the Sixth Amendment invokes, of itself, the protection of a trial Court," as said in *Johnson v. Zerbst, supra*, failure of the court to perform its official duty under the Constitution forecloses a trial in habeas corpus action of facts the sentencing court could have based a finding on had it performed its official duty. The trial Judge himself, as well as the United States Attorney who prosecuted the case, both swore positively that they had no knowledge of any proceeding and finding as to waiver of counsel, and nobody else testified to such a proceeding.

In considering the indictment on habeas corpus, therefore, the general rules as to indictments do not apply. Petitioner, having never heard of such a thing as a demurrer,

may not be denied habeas corpus because he should have demurred.

"While it is settled law that the writ of habeas corpus cannot be employed as a substitute for a writ of error (now an appeal) and can go only to the question of jurisdiction and legality of sentence, yet if the government, through its officers, makes it impossible for the convicted person to secure and prosecute a writ of error from such conviction, he has a remedy, by habeas corpus, to raise all the questions he might have raised under the perfected writ of error". (*Briggs v. White* (C. C. A. 8), 32 F. 2nd 108, 110.)

"Of the contention that the law provides no effective remedy for such a deprivation of rights effecting life and liberty it may well be said—as in *Mooney v. Holohan*, 224 U. S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A. L. R. 406,—that 'it falls with the premise'. To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' (*Mooney v. Holohan*, *supra*) but destructive of a constitutional guarantee specifically designated to prevent injustice." (*Johnson v. Zerbst*, 58 S. Ct. 1019, 1024.)

The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—*without supplying protective process*. *Moore v. Dempsey*, 261 U. S. 86, 91." (*Brown v. Mississippi*, 56 S. Ct. 461, 465; italics added.)

The indictment in this case charges a bank robbery in count one and the putting of life in jeopardy in count two. The court imposed ten years in count one and fifteen years in count two, ordering the sentences to run consecutively. These sentences, as appears in the next point below and to say the least, put petitioner twice in jeopardy for the same offense. If the court had jurisdiction to impose either of the sentences—a fact petitioner denies—the decisions, as mentioned above, are conflicting as to which sentence is

valid. But aside from that conflict, no evidence was adduced to show which count sentence could be imposed on. Trial of the case on demurrer would have compelled the prosecution to stand on one count, to say the least.

We conclude that, where petitioner entered a plea of guilty to such indictment without the assistance of counsel and without waiver of such assistance, and where the sentencing Judge advised petitioner that anyone guilty of any part of the indictment was guilty of all, habeas corpus was proper remedy.

“ * * * but it is equally true that the provision (for counsel) was inserted in the Constitution *because the assistance of counsel was recognized as essential to any fair trial for a case against a prisoner.*” (Powell v. Alabama, 287 U. S. 45, 70, quoting with approval *Ex parte Chin Loy Yuh*, 223 Fed. 833; italics added.)

Furthermore, as to a prisoner in custody, it is a general rule that rights may not be waived.

Diaz v. U. S., 223 U. S. 442;

Hopt v. Utah, 110 U. S. 574, 579;

Frank v. Mangum, 237 U. S. 309;

Powell v. Alabama, 287 U. S. 45;

Ex parte Chin Loy Yuh, 223 Fed. 833.

II.

Habeas corpus is a proper remedy where an accused is sentenced to conflicting sentences ordered to run consecutively.

Habeas corpus is a proper remedy by which to raise the issue of twice in jeopardy where the jeopardy is of a nature that renders the judgment void, and not merely voidable.

Hans Nielsen, Petitioner, 131 U. S. 176;

Ex parte Lange, 18 Wall. (U. S.) 163.

In this case, ten years were imposed on count one and fifteen years on count two of the indictment, sentences

being ordered to run consecutively. Assuming that the court had jurisdiction to impose either one of those sentences, but not both, one of the sentences is void. But which one? The answer is in the statute itself: the punishment is conflicting, that is to say, there is a material difference in both minimum and maximum terms that could be imposed under each count of the indictment.

Hence, to say the least, the valid sentence could be only the one proved by evidence to have been committed. If the indictment set up a material conflict as to what crime was committed, count one alleging one crime and count two another, each punishable by a materially different punishment, the conflict could be resolved only by evidence. The consecutive sentences, however, prove that no evidence was introduced and that the court construed, applied, and enforced the indictment and statute as defining and charging two separate and distinct crimes.

Even if the statute is constitutional in some respects, it may be attacked as unconstitutional because of the construction put on it in a given case.

Nashville C. & St. L. R. Co. v. Wallace, 288 U. S. 249.

"The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms *or is made to read by construction*, is fairly open to denial, and is denied." (*Miller v. Cornwall Ry. Co.*, 168 U. S. 132; italics added.)

In the District Court below, *McNally v. Hill*, 293 U. S. 131, was cited as authority that *habeas corpus* may not be resorted to when an unexpired sentence is legal and release is sought from a void sentence not being served at the particular time. Petitioner agrees with that rule. That case, however, is not in point with petitioner's case. While petitioner did contend in the District Court that the second sentence was void, he also contended that the whole judgment was void.

The gist of this matter is: where only one possible sentence could be imposed, if any, the Court imposed conflicting sentence for the same crime, ten years on count one and fifteen years on count two, ordering those sentences to run consecutively, so that no court has power to sever the sentences and say that either one may be served. The situation does not differ substantially from one in which, on one count, a court imposed ten years at one time and later changed that sentence to fifteen years. Such a second sentence would be void on its face and the first vacated.

Ex parte Lange, 18 Wall. (U. S.) 163, 173.

That conclusion is compelling where subsections (a) and (b) of section 588(b) T. 12, U. S. C., provide for conflicting punishments for the same crime. Subsection (a) punishes robbery by means of "force and violence", and subsection (b) punishes the same robbery and "Jeopardy" of life "by the use of a dangerous weapon".

No distinction can be made between putting life in jeopardy on the one hand and force and violence on the other. The act of actually firing a weapon and shooting a person in a robbery is "force and violence" which is an essential element of robbery; it may be "jeopardy" too, which is also an essential element of robbery. It is to be observed, however, that putting a person's life in jeopardy by the use of a dangerous weapon is a vague and indefinite clause; where it begins is not certain; how it is to be determined has never been and doubtless cannot be defined. How can a jury say that a certain act put a person's life in jeopardy? How is that to be distinguished from "force and violence"?

" * * * this Court has settled that the test of identity of offenses is whether the same evidence is required to sustain them * * * "

(*Morgan v. Devine*, 237 U. S. 632, 641.)

Gaviers v. U. S., 220 U. S. 338, 341.

"The elementary rule is that penal statutes must be strictly construed, and it is essential that the crime punished must be plainly and unmistakably within the statute." (Balleu v. U. S., 160 U. S. 187, 16 S. Ct. 263, 267.)

Petitioner has pointed out in the next point above that, at the time of sentence, the sentencing Judge advised petitioner that anyone guilty of any part of the indictment was guilty of all. Petitioner so testified in the Court below and the sentencing judge, who filed a deposition against petitioner, did not deny such advice to petitioner; neither did the United States Attorney deny such fact. Such instruction was equivalent to a rule that both counts of the indictment charged the same offense.

It therefore appears that the sentences are conflicting as to the same offense. In legal effect the sentences cannot be severed.

From another point of view, suppose petitioner had been appointed counsel and a demurrer to the indictment had been filed. Could the court have dismissed one count without returning the grand jury? We think not. Such a dismissal of one count, where the punishments are materially different under each, would have been an amendment of the indictment in violation of the Constitution.

"The opinion which he (the sentencing judge) rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the Court's action in permitting the change in the indictment upon the ground that the words stricken out were surplusage, and were not all material to it, * * * *How can the Court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced it was made to deceive anybody else?*" (*Ex Parte Bain*, 121 U. S. 1, 7, S. Ct. 781, 787; italics added.)

Likewise, if the two subsections in question are materially different in both the definition of crime and the punishment, who could say how many grand jurors voted for the indictment because they were convinced that there was guilt under one count and how many under another? Under the Bain rule, *supra*, the indictment would have been returned to the grand jury upon demurrer or quashed entirely.

Plea of guilty to the indictment without assistance of counsel, together with a sentence for conflicting terms on each count, therefore renders the entire judgment void, and *habeas corpus* lies.

III.

None of the evidence was material; but if material it was inadmissible.

Evidence was introduced to prove that petitioner competently and intelligently waived his right to counsel. The pertinent parts of the evidence read as follows:

(Sentencing Judge)—“ * * * that sentence in the case of *United States v. Forrest Holiday* was imposed more than two years ago, and for that reason I have no independent recollection of making this offer and inquiry in said case, but in view of my long established practice in such cases and the fact that I imposed a long prison sentence, I am positive to a moral certainty that I did so inquire of said *Forrest Holiday* whether or not he desired to be represented by Counsel before I permitted the plea of guilty to be entered in said case.”

(United States Attorney) * * * “I have no independent recollection of what I said to the Defendant nor what the Judge said to the Defendant.”

“ * * *, I am sure to a moral certainty that Judge Miller followed the custom that prevails in this case.”

(Deputy United States Marshal) * * *, and as such Deputy aforesaid, he together with S. J. Doyle,

the United States Marshal for the District of North Dakota, on or about October 22, 1936, transported the petitioner herein, Forrest Holiday, from Fargo, North Dakota, to McNeil Island, Washington under a commitment of the United States District Court for the District of North Dakota; that during the course of said trip said petitioner brought up the subject of the sentence imposed upon him by the Honorable Andrew Miller, * * * This affiant asked petitioner why he had not gotten himself an attorney and stood trial, to which petitioner replied he had no use for an attorney; that he would have been satisfied had he received the sentence promised him, and he further advised this affiant that he had not stood trial because he feared certain things might develop that would not be for the best interest of said petitioner and made the statement:

"I knew I would get the book thrown at me". * * * He (petitioner) claimed that he had made a deal with the F. B. I. men that he would plead guilty and take a twenty-five year sentence, but he did not figure that he was going to get two sentences, ten and fifteen years. He kept telling about that all the time, telling about what a raw deal he got. I asked him "why didn't you get an attorney to fight the case"?

His statement was something to the effect that he couldn't afford to go to Court, that if he did they would hang him. There was more or less conversation all the way down."

Enough has been said under Point I above that the testimony quoted above is immaterial to the issues and proves nothing about any proceeding to determine whether petitioner "competently and intelligently" waived his right to Counsel.

Before any court in a *habeas corpus* proceeding can determine that a "competent and intelligent waiver of the right of counsel" was made in the sentencing Court, the evidence on which the waiver, if any, was held to be "competent and intelligent" must be considered.

The above testimony does not show or indicate one word of evidence that was before the sentencing Judge.

However, if the evidence were material to the issues, petitioner had a constitutional and a statutory right to cross-examine the witnesses.

Alford v. U. S., 282 U. S. 687.

28 U. S. C. sections 639, 640, 641.

The evidence was therefore inadmissible.

These depositions, it will be observed, were taken by the Department of Justice, of which the Attorney General is head.

The Attorney General has custody of petitioner.

18 U. S. C. section 753(f), which provides in part:

"All persons convicted of an offense against the United States, shall be committed * * * to the custody of the Attorney General of the United States * * * The Attorney General is authorized to order the transfer of any person held under authority of any United States statute * * *" (*In re Berman* (C. C. A.) 80 F. (2nd) 361; Certiorari denied.)

It is further the law that, in all courts of the United States, a prisoner or other person has the right to represent himself.

"In all the Courts of the United States the parties may plead and manage their own cases personally, or by the assistance of such counsel or attorneys at law as, by the rules of said Courts, respectively, are permitted to manage and conduct actions therein." (28 U. S. C. sec. 394).

The Attorney General, desiring to take depositions against petitioner, should have given petitioner the notice provided for in 28 U. S. C. section 639, and transferred petitioner to the scene so that petitioner could represent

himself and exercise his statutory and constitutional right to cross-examine the witnesses.

IV

The District Court has no jurisdiction to issue a writ of *habeas corpus* returnable before a United States Commissioner.

It is long settled that, in *habeas corpus* cases, legislation is essential to a court's power to issue a writ of *habeas corpus*.

Re Bollman, 4 Cr. 75, 94:

"That when Congress * * * extended the writ of *habeas corpus* * * * *procedural regulations were included* * * *" (*Frank v. Mangum*, 237 U. S. 309, 330; italics added).

Johnson v. Zerbst, 58 S. Ct. 1019, 1024.

Such procedural regulations, as is said in *Frank v. Mangum*, *supra*, are in part as follows:

"The Court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto." (28 U. S. C. sec. 455.)

"Any person to whom such a writ is directed shall make due return thereof within three days thereafter * * *" (28 U. S. C. sec. 456).

"The person making the return shall at the same time bring the body of the party before the judge who granted the writ." (28 U. S. C. sec. 458.)

"When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time." (28 U. S. C. sec. 459.)

The above provisions are of clear and obvious import.

"The statute does not define the term *habeas corpus*. To ascertain its meaning and the appropriate use of the

writ in the federal courts, recourse must be had to the common law, from which the term was drawn, and to the decisions of this Court interpreting and applying the common-law principles which define its use when authorized by statute. (Citing list of Authorities here omitted.)"—(*McNally v. Hill*, 293 U. S. 131, 55 S. Ct. 24, 26; italics added.)

"The writ, in its historic form, like that now in use in the Federal Courts, was directed to the disposition of the custody of the prisoner. It commanded the officer to 'have the body' of him 'detained in our prison under your custody' * * * before the judge * * *"
(*Id.* Note 2, p. 27; italics added).

The Constitutional provision of Article I, section 9, clause 2 prohibits the suspension of the writ and procedure of the common law as defined in *McNally v. Hill*, *supra*.

However, the courts have suspended the writ in violation of the Constitution and the Federal Statute as to persons who have no attorney, and usually to those who have not the right attorney.

Appellant asserts therefore, that the court below erred in failing to grant the writ, in failing to hold a full hearing on the issue * * *

Whether or not such contention is sound we need not consider, because in addition to the procedure mentioned in the statute, another manner of proceeding has been approved by the Supreme Court.

(*Walker v. Johnson*, (C. C. A. 9) 109 F. (2) 436; italics added.)

The rule of the Supreme Court—i. e., *Ex parte Yarbrough* 110 U. S. 651, 653,—is not in point with the above rule; it applies only where the prisoner has an attorney and the procedure is confined to the indictment and judgment. On the other hand the rule in the *Yarbrough* case is entirely arbitrary, and it has in effect been overruled by

many cases, including *Frank v. Mangum*, 237 U.S. 309; *Johnson v. Zerbst*, 58 S. Ct. 1019.

For the above reasons, the District Court lacks jurisdiction to issue a writ of *habeas corpus* returnable before a United States Commissioner.

Prayer.

Wherefore, petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit commanding it to certify to the Supreme Court all the records in the above cause for the purpose of having the decision reviewed by the Supreme Court.

FORREST HOLIDAY,

Petitioner.

STATE OF CALIFORNIA,

County of San Francisco, ss:

Subscribed and sworn to before me this 15 day of October, 1940.

E. J. MILLER,

Associate Warden, U. S. Penitentiary,

Alcatraz, Calif.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths,

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MAY 2 1941

CHARLES CLARENCE SHIPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 14, Original

FORREST HOLIDAY,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES
PENITENTIARY, ALCATRAZ, CALIFORNIA.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

CHARLES CLARENCE SHIPLEY
Clerk for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 14, Original

FORREST HOLIDAY,

Petitioner,

vs.

**JAMES A. JOHNSTON, WARDEN, UNITED STATES
PENITENTIARY, ALCATRAZ, CALIFORNIA.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.**

BRIEF FOR PETITIONER.

Opinion Below.

The Circuit Court of Appeals for the Ninth Circuit wrote no opinion. The District Court for the Northern District of California entered an order (R. 66) approving the report of the United States Commissioner (R. 26-32), and also filed a certificate that there was no merit in petitioner's application for appeal *in forma pauperis* (R. 68-69).

Jurisdiction.

The order of the District Court of the United States for the Northern District of California, denying petitioner's application for a writ of *habeas corpus*, was entered on July 1, 1940 (R. 66). Petitioner's motion for leave to appeal *in forma pauperis* was filed in the District Court on August 1, 1940 (R. 66), and the order denying the appeal *in forma pauperis* was filed on August 12, 1940 (R. 68). The petition for leave to appeal *in forma pauperis* was filed in the Circuit Court of Appeals for the Ninth Circuit on August 27, 1940 (R. 73), and was denied without opinion on September 5, 1940 (R. 76). The petition for a writ of certiorari, unaccompanied by a record, was received by the Clerk of this Court on October 21, 1940,¹ and it was filed and granted on March 3, 1941 (R. 76). The jurisdiction of this Court rests upon Section 262 of the Judicial Code.²

Questions Presented.

1. Whether the so-called "writ of *habeas corpus*" made returnable before a United States commissioner is a valid writ.

2. Whether, if the so-called writ were valid, the proceeding before the United States Commissioner and the District Court was nonetheless invalid because of plain and prejudicial errors of law.

3. Whether the decision of the District Court may be supported on a ground not suggested by that court—that no writ need have issued because no violation of the Fifth and Sixth Amendment was charged.

¹ Information supplied by the Clerk.

² The petition (p. 1) invokes jurisdiction under Section 240(a) of the Judicial Code, as amended (U. S. C., Title 28, Sec. 347(a)). It seems clear, however, that jurisdiction must rest on Section 262. See *In re 620 Church Street Corp.*, 299 U. S. 24, 26. See also Point I, *infra*.

4. Whether the admitted error in sentencing petitioner to two consecutive terms of imprisonment for the same offense can be corrected by a decision by the Court at the present time that only the ten-year sentence imposed on the first count is valid.

Constitutional and Statutory Provisions Involved.

The relevant constitutional and statutory provisions are set out in the Appendix, *infra*.

Statement of Facts.

On May 8, 1939, pursuant to leave granted (R. 9), petitioner filed an amended petition for a writ of *habeas corpus* in the United States District Court for the Northern District of California (R. 1-3). From his amended petition (hereinafter referred to as the petition) it appears that on September 24, 1936,³ he was indicted in the United States District Court for the District of North Dakota. The indictment was in two counts, and charged robbery by force and robbery putting lives in jeopardy of a State bank insured by the Federal Deposit Insurance Corporation.⁴ Petitioner was convicted under that indictment on October 13, 1936, upon a plea of guilty. He is now in prison in the United States Penitentiary at Alcatraz, California, in the custody of respondent in execution of a judgment and sentence, imposed pursuant to that conviction, of ten years' imprisonment on the first count, and fifteen years sentence on the second count, the fifteen year sentence to commence at the expiration of the sentence on the first count (R. 1-3).

³ The date stated in the petition (R. 1) is May 27, 1936. The correct date appears from the indictment itself (R. 5), attached to the petition as a part of "Exhibit A".

⁴ Robbery of a bank insured by the Federal Deposit Insurance Corporation, defined in the Federal Reserve Act, Sec. 12(c) (8), U. S. C., Title 12, Sec. 264(c) (8), as an "insured bank", is made a Federal crime by U. S. C., Title 12, Secs. 588a and 588b.

We understand that the Government now concedes that one of the two sentences is invalid.

The petition alleges that the judgment, sentences and imprisonment are contrary to the statutes, laws and the Constitution of the United States in two respects: (a) that at the trial petitioner did not have the advice and assistance of counsel; that the trial court did not advise or inform him that he was entitled to counsel; that he did not know he was so entitled if he could not pay for counsel; and that he did not make an intelligent or competent waiver of his constitutional right "to have the assistance of counsel for his defense" (R. 1-2); and (b) that although petitioner had committed but one offense, he had been sentenced under two counts of an indictment for two terms to run consecutively, and hence had been put in double jeopardy (R. 2). Annexed to the petition were certified copies of the indictment, the order of commitment and the marshal's return thereto, and the arraignment, plea and sentence (R. 3-9).

The entire proceeding in the District Court was conducted in a way utterly at variance with the speed with which *habeas corpus* proceedings should move. On June 29, 1939, almost two months after the petition was filed, and even then apparently only after a further motion by petitioner's attorney (see R. 9), District Judge Lauderback issued an order to respondent directing him to show cause on July 10, 1939, why a writ of *habeas corpus* should not issue (R. 9-10).

On July 10, 1939, respondent filed a return to the writ (R. 10-11), which showed that he held petitioner under a commitment issued by the United States District Court for the District of North Dakota, and a transfer from the United States Penitentiary at McNeil Island, Washington, to Alcatraz, ordered by the Attorney General (R. 10-11). Attached to the return were certified copies of the same papers as were attached to the petition, plus the docket entries and the transfer order (R. 11-13). Also attached were a "Cer-

tificate" of Judge Miller of the United States District Court for the District of North Dakota, and an affidavit of Deputy United States Marshal Kennedy of the same district (R. 15-16). In substance, Judge Miller stated that he had no independent recollection of petitioner's case, but that it had always been his uniform practice to inquire of defendants charged with felonies who appeared without counsel whether they wanted counsel, and that he was positive to a moral certainty that he had so inquired of petitioner before he permitted the plea of guilty (R. 15). Deputy Marshal Kennedy's affidavit stated that on the way from Fargo, North Dakota, to McNeil Island, Washington, petitioner complained about a broken promise of a government agent with respect to his sentence; and that when Kennedy asked him why he hadn't gotten a lawyer and stood trial, petitioner stated that he had no use for an attorney, and that he had not stood trial because he feared it would not be for his best interests (R. 15-16).

Petitioner filed a traverse to the return on July 31, 1939, denying that Judge Miller had at any time inquired whether he desired to be represented by counsel, and also denying that he had made the statements attributed to him by Deputy Marshal Kennedy (R. 16-18).

Almost five months after an issue of fact had thus been joined, on December 8, 1939, Judge Welsh, of the United States District Court for the Northern District of California, witnessed what is styled in the record as a "Writ of Habeas Corpus" (R. 18), requiring respondent to

"* * * have the body of Forrest Holiday * * * before the United States Commissioner for the Northern District of California, Southern Division, at the * * * United States Penitentiary at Alcatraz, California, on the 16th day of December, 1939 * * * then and there to do, submit and receive whatsoever the United States Commissioner shall then and there consider in that behalf." (Italics supplied.)

The hearing before the Commissioner at the Penitentiary was held three days late (R. 71) on December 19, 1939 (R. 36-65). Petitioner was the only witness. He testified, in substance, as follows:

Petitioner was arrested at Excelsior Springs, Missouri, about September 21, 1936, by two agents of the Federal Bureau of Investigation (R. 37-38, 43). After about two weeks in the jail at Kansas City, he was brought before the United States Commissioner there on three occasions, all about October 7, 1936, with a view toward removal for trial in North Dakota (R. 38, 44, 46). On two of the three occasions he was represented by an attorney, whom he paid \$100, and who advised him to consent to his removal (R. 44, 46, 54). He told the attorney that he was innocent (R. 53). The attorney gave no advice as to how he should plead (R. 52, 54). Two men from the Department of Justice told him that if he did not say that he was guilty and did not waive extradition, he would get eighty years in jail and his witnesses, if he had any, would get ten years (R. 38, 45, 60-63), and that if he did sign the statement and the waiver, one of the agents would recommend that he get only ten years (R. 63). He waived extradition (R. 39, 45; 32) and at the same time, without having discussed the matter with his attorney (R. 48), signed a statement that he was "implicated in the robbery" (R. 47; 33). He did this for the purpose of avoiding an eighty-year sentence (R. 63) and on the representation of one of the Federal Bureau of Investigation agents that they would use their best efforts to obtain for him a sentence of not more than ten years (R. 64).

Then he was taken to jail in Fargo, North Dakota, and put in a ward by himself, where he was not visited by any friends or attorneys (R. 39, 47). When he was arraigned, about four days later (R. 39), the Clerk did not read the indictment (R. 40), but Judge Miller told him the nature of

the charge (R. 49). The United States attorney read the first count of the indictment; the judge asked what his plea was; and the petitioner answered "guilty" (R. 50-51). The United States attorney then read the second count; the judge asked what the plea was; petitioner hesitated, and the judge instructed that anyone who was guilty of any part of it was guilty of all (R. 51). Petitioner then pleaded guilty to the second count (R. 51). Judge Miller did not ask whether he desired to have counsel and did not advise him that he had a right to counsel (R. 40, 51, 64). The District Attorney did not advise him that he had a right to counsel (R. 40). Petitioner did not have counsel, did not have money to pay for counsel, and did not know he had a right to have counsel without money to pay for counsel (R. 40-41, 51). No one made any representations to the court for leniency on petitioner's behalf (R. 42, 64). The agent who appeared simply told the court of petitioner's prior arrests, convictions and terms of imprisonment (R. 64).

In travelling with Deputy Marshal Kennedy after the trial, petitioner did not discuss his failure to have an attorney (R. 41-42, 60-61).

Petitioner was at the date of the hearing about 36 years old, and had had education through one year of high school (R. 42, 43, 56, 58). He also had had university extension courses in mechanics (R. 56), had done considerable reading in both scientific subjects and fiction (R. 56). He had been arrested six or eight times, but had appeared in court only twice (R. 42-43, 58). Twenty years before he had been arrested in Drumright, Oklahoma, on a charge of vagancy, and on that occasion he had had no funds with which to engage an attorney and had had no attorney (R. 43, 57-58). In 1925 he was arrested at Fargo, North Dakota, on a charge of larceny, was removed to Hudson, Wisconsin, where he was tried and sentenced to one to ten years, under which he served six months in the State penitentiary and three

years in the reformatory (R. 42-43, 57, 59). In the extradition proceeding in Fargo, North Dakota, at that time, and in the subsequent trial in Wisconsin he was represented by attorneys whom he paid (R. 42-43, 58). He had never been advised by anyone, and did not know until he read the decision in *Johnson v. Zerbst* that he was entitled to have counsel represent him in a criminal proceeding if he had no funds to employ counsel (R. 40, 43, 59).

At the close of petitioner's testimony, the hearing was continued to January 15, 1940, at the request of counsel for respondent, so that he might locate the agents and obtain their depositions (R. 65). This was never done. Instead, on January 24, 1940, counsel for respondent served notice (R. 24-25) of the taking of depositions from P. W. Lanier, United States District Attorney for the District of North Dakota, and Deputy Marshal Kennedy, on February 13, 1940, at Fargo, North Dakota. When the depositions were taken, respondent was represented by local counsel, and no appearance was made on behalf of petitioner (R. 19). District Attorney Lanier deposed to the effect that he had met petitioner on the occasion when he handled his arraignment; that he had no independent recollection of what he or Judge Miller had said to the petitioner at that time; that the invariable rule since he had been in office was for the United States Attorney or one of his assistants to explain an indictment to a defendant who had no attorney, and for the Court to advise defendant of his right to have counsel provided for him if he wanted one and had no money; and that he was sure to a moral certainty that Judge Miller had followed in petitioner's case the custom which prevailed (R. 21-22). Deputy Marshal Kennedy stated that after the trial petitioner had complained to him that he got a "raw deal"; that when asked why he didn't "get an attorney and fight the case" petitioner answered that he "couldn't afford to go to Court, that if he did they would hang him"; and

that at no time on the trip from North Dakota to McNeil's Island, Washington, did petitioner indicate that he desired an attorney (R. 23-24).

On April 30, 1940, the hearing was reopened (R. 33). The depositions of Lanier and Kennedy were offered by respondent (R. 34). Petitioner's counsel objected to several of the questions and answers but all objections were overruled (R. 34-35). Respondent then offered, and the Commissioner received as exhibits (R. 36), the petitioner's consent to removal from Kansas City (R. 32-33) and petitioner's statement that he was implicated in the robbery (R. 33).

The Commissioner filed his report with the District Court on May 23, 1940 (R. 26-32). He summarized the oral evidence (R. 27-28), considered the "certificate" of Judge Miller and the affidavit of Kennedy attached to respondent's return (R. 29) and reviewed respondent's exhibits and depositions (R. 29-30). The Commissioner then makes the following Findings of Fact (R. 30):

"(1) Petitioner's criminal experience enabled him to understand and appreciate his rights;

"(2) Petitioner voluntarily entered a plea of guilty after thoroughly understanding the charges involved;

"(3) It was the uniform practice of the Court in which sentence was imposed to inquire of those charged with felonies whether or not they wished counsel;

"(4) The Court in which sentence was imposed advised petitioner of his constitutional right to be represented by counsel;

"(5) Petitioner voluntarily signed an admission of guilt;

"(6) Petitioner competently and intelligently waived his right to the assistance of counsel."

Then, as The Law (R. 31-32) the Commissioner states various propositions, including the statement (R. 31):

"Supporting affidavits are proper evidence in *habeas corpus* proceedings."

In conclusion "predicated upon the facts and the law" the Commissioner recommended that petitioner's application be denied (R. 32).

Although this report was filed on May 23, 1940, no notice of it was given to petitioner. On June 18, 1940, petitioner filed a petition in the Circuit Court of Appeals for the Ninth Circuit seeking to mandamus Judge Welsh to decide the case (R. 70-72).⁵ In that petition petitioner stated that so far as he knew, the Commissioner had not reported (R. 71). On July 1, 1940, after a hearing of which again apparently no notice was given (Pet. for Certiorari, p. 3), Judge Welsh ordered that the report of the Commissioner be "approved", and that the application for the writ is "denied", and the writ "discharged" (R. 66).^{5a}

On August 1, 1940, petitioner filed in the District Court a motion for leave to appeal *in forma pauperis* (R. 66-67), setting forth the assignments of error. Judge Welsh denied the motion on August 12, 1940, on the ground that "there is no merit in the application for appeal now before the court" (R. 69). Petitioner then on August 27, 1940, applied to the Circuit Court of Appeals for the Ninth Circuit for leave to appeal *in forma pauperis* repeating the same assignments of error (R. 73-74). The application was denied without opinion on September 5, 1940 (R. 76). The petition for writ of certiorari was received by this Court on October 21, 1940,⁶ and was granted on March 3, 1941 (R. 76).

⁵ The petition for leave to file a petition for a writ of mandamus was denied on July 16, 1940 (R. 73) after the decision of Judge Welsh on July 1, 1940.

^{5a} We have been informed (after changes in this brief were no longer possible) that notice of the filing of the Commissioner's report was given to petitioner's attorney.

⁶ See footnote 1, *supra*.

Summary of Argument.

I.

The Court unquestionably has jurisdiction (*In re 620 Church Street Corp.*, 299 U. S. 24, 26), and it also has the power to proceed *in forma pauperis*. U. S. C., Title 28, Section 832. Moreover, even though the technical issue before the Court may be only whether the Circuit Court of Appeals for the Ninth Circuit abused its discretion in denying an appeal *in forma pauperis*, nevertheless, for many reasons, the Court should now pass on the merits of the issues raised.

II.

A. The writ issued by the district court was not a valid writ of *habeas corpus*. It did not comply with the provisions of the statute requiring the production of the petitioner "before the judge who granted the writ." R. S. Sec. 758. Nor did it comply with the requirement that the judge shall determine the facts by hearing the testimony. R. S. Sec. 761.

The noncompliance with the statute cannot be explained away on the ground that an appearance before a United States Commissioner is equivalent to an appearance before a judge. A United States Commissioner is not a judge and has not a judge's authority. *Grin v. Shine*, 187 U. S. 181, is thus distinguishable.

Nor can the noncompliance with the statutes be explained by the subsequent "approval" of the Commissioner's report by the judge. The provisions of the statute must be followed. Moreover, the procedure of a Commissioner's report is completely inconsistent with the policy expressed in recent decisions of this Court.

B. Rule 53 of the Rules of Civil Procedure is not applicable. Under Rule 81(a)(2) the rule is inapplicable to

habeas corpus proceedings, except upon appeal. Moreover, even if the rule were generally to be applied, the application of Rule 53 in the present case is denied by the rule itself. Rule 53(b).

C. Finally, even if the reference to a special master in *habeas corpus* proceedings is proper, the Court should not sanction the manner in which the device was utilized here. The hearing was held in prison—certainly not “judicial” procedure. The Commissioner rendered his decision on the basis of plain and unquestionable errors of law, which are demonstrably prejudicial and not cured by the district court. The district court made no findings of fact. The hearing on the “approval” of the report was apparently *ex parte*.

The decision should be reversed, with instructions to issue a proper writ of *habeas corpus* and hold a proper hearing. In any event, the decision should be reversed and the cause remanded, with instructions to refer the case for a determination of the facts according to law and justice.

III.

The decision may not be sustained on the ground that the writ need not have issued at all. On the facts stated, there is plainly a denial of the assistance of counsel guaranteed in the Fifth and Sixth Amendments to the Constitution. On those facts petitioner was entitled to a proper hearing in order that he might establish them.

A. The present case is directly controlled by recent decisions. *Walker v. Johnston*, No. 173, Present Term; *Johnson v. Zerbst*, 304 U. S. 458. These cases establish that the Fifth and Sixth Amendments grant more than simply the privilege of appearing by counsel. They establish that a plea of guilty is irrelevant; it is not a waiver as a matter of law, nor is it a conclusive indication of the lack of need

for the assistance of counsel. They establish the irrelevance of petitioner's prior conviction and of petitioner's representation by counsel at the preliminary hearings before his extradition.

Moreover, petitioner here makes a stronger case than was presented in these recent decisions. He was induced to plead guilty by false statements as to the possible amount of his sentence. He was promised a recommendation of leniency, but the promise was broken. He was given admittedly false legal advice by the judge. Here the judge had no independent information as to the petitioner's innocence or guilt.

The only issue which cannot be said to be settled by prior decisions is whether a request for counsel is necessary. Even on that issue, however, we believe that prior decisions are controlling. The opinion in *Johnson v. Zerbst* is admitted by the Government to have so indicated. The opinion and decision in *Walker v. Johnston* gives a similar indication. In the latter case, as here, the petitioner was ignorant of his right to have counsel if he could not pay for counsel, and could not therefore have requested counsel: a man does not request the enforcement of a right of the existence of which he is ignorant. The decision in the *Walker* case, therefore, that the pleadings stated a case for the issuance of a writ, necessarily decides that a request is not essential.

B. The prior decisions of the Court which deny the necessity of a request for counsel are fully supported by the historical background of the Sixth Amendment and by modern authorities.

IV.

The second ground urged in the petition for the writ of *habeas corpus*—that the consecutive sentences punish petitioner twice for the same offense—is admitted by the Gov-

ernment to be valid. The question of which sentence is valid—the ten-year sentence imposed on the first count or the fifteen-year sentence imposed on the second count—is properly before the Court, inasmuch as it must be determined in order to decide whether the petition is in this respect premature. That question must be resolved against the validity of the fifteen-year sentence on the second count.

ARGUMENT.

I.

This Court has, and should exercise, jurisdiction to decide the substantial issues raised by this record.

The motion for leave to appeal *in forma pauperis* was first directed by petitioner to Judge Welsh in the District Court (R. 66). That court filed a brief memorandum reviewing the merits of the case and certified that (R. 69):

“ * * * in the opinion of the undersigned, *there is no merit in the application for appeal now before the court.*” (Italics supplied.)

Judge Welsh therefore denied the appeal *in forma pauperis* (R. 69). The petitioner's subsequent petition to the Circuit Court of Appeals for leave to appeal *in forma pauperis* (R. 73) was denied without opinion (R. 76). The propriety of these procedural steps is indicated in *Smith v. Johnston*, 109 F. (2d) 152, 154, 155 (C. C. A. 9th), and in Rules 73(a) and 81(a)(2), Rules of Civil Procedure.

Apart from the fact that the present proceeding is *in forma pauperis*, the authority of this Court to entertain the cause, notwithstanding the denial of leave to appeal by the Circuit Court of Appeals cannot be questioned. *In re*

620 Church Street Corp., 299 U. S. 24, 26.⁷ Conceivably, however, the question may arise whether the statute granting the right to proceed *in forma pauperis* denies to the Circuit Court of Appeals, and presumably also to this Court, the power to entertain an application for appeal in that form. We submit that the governing statute imposes no such limitation here, and that the only question which is presented is the scope of review which should be exercised by this Court.

Unquestionably the right to proceed *in forma pauperis* is a statutory right, controlled at present by Section 832, Title 28, U. S. C.⁸ That section provides, in part, as follows:

"Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion

⁷ The record does not indicate (except on the cover) when the petition for certiorari was filed. Were the jurisdiction of this Court invoked under Section 240(a) of the Judicial Code, there might, therefore, be some question as to the showing of compliance with Section 8(a) of the Act of February 13, 1925, requiring the petition to be filed in three months. Even in that case, however, the records of this Court will show the receipt of the petition for certiorari on October 21, 1940, less than three months after the entry of the order in the Circuit Court of Appeals. It seems plain, however, that the provisions of Section 8(a) do not limit the authority of this Court, pursuant to Section 262, to "give full force and effect to existing appellate authority, and of furthering justice in other kindred ways." *United States v. Beatty*, 232 U. S. 463, 467. Laches would seem to be the only bar, and certainly no laches is shown here.

⁸ The right was conferred in the first instance by the Act of July 20, 1892 (c. 209, 27 Stat. 252), but was limited to proceedings in courts of first instance. *Bradford v. Southern Ry. Co.*, 195 U. S. 243. It was extended to appellate proceedings by the Act of June 25, 1910 (c. 435, 36 Stat. 866). *Kinney v. Plymouth Rock Squab Co.*, 236 U. S. 43.

of the court such appeal is not taken in good faith, without being required to prepay fees or costs * * *

Some decisions, particularly of the Circuit Court of Appeals for the Ninth Circuit, have held that when the district court refuses to allow an appeal *in forma pauperis* and certifies, in the language of this section, that the appeal "is not taken in good faith", the certificate is conclusive, and the circuit court of appeals is powerless to entertain a subsequent application. See *Smith v. Johnston*, 109 F. (2d) 152 (C. C. A. 9th); *Waley v. Johnston*, 104 F. (2d) 760 (C. C. A. 9th); *Stanley v. Swope*, 99 F. (2d) 308 (C. C. A. 9th); *Kelly v. Johnston*, 99 F. (2d) 582 (C. C. A. 9th), certiorari denied, 305 U. S. 597; *In re Wragg*, 95 F. (2d) 252 (C. C. A. 5th), certiorari denied, 305 U. S. 596. Even in those cases, however, there is a clear distinction made between a certificate of lack of merit in the appeal, as in the present case,⁹ and a certificate in the words of Section 832, that the appeal is "not taken in good faith". See *Smith v. Johnston*, *supra*, 109 F. (2d) at pp. 154-155. As the court there points out, the application for leave to proceed *in forma pauperis* should always show some merit in the application. *Kinney v. Plymouth Rock Squab Co.*, 236 U. S. 43, 45. The decision of the district court that the appeal is without merit, however, is not conclusive; it must be considered *de novo* by the

⁹ There can be no question of the interpretation of the certificate here. The conclusion of Judge Welsh that there was "no merit" in the appeal was expressly based upon the reasons set forth in his order (R. 68-69) which went solely to the merits of his prior decision. The distinction between lack of merit and lack of good faith had been set forth at length almost seven months before in *Smith v. Johnston*, 109 F. (2d) 152 (C. C. A. 9th) and was undoubtedly well known to Judge Welsh. Although a lack of good faith could, of course, be shown by the complete frivolousness of the issue raised, the certificate did not here so state. Compare the quotation from the certificate in, *e. g.*, *Waley v. Johnston*, 104 F. (2d) 760 (C. C. A. 9th); *Stanley v. Swope*, 99 F. (2d) 308 (C. C. A. 9th); *Kelly v. Johnston*, 99 F. (2d) 582 (C. C. A. 9th) certiorari denied, 305 U. S. 597; *Brown v. Johnston*, 99 F. (2d) 760 (C. C. A. 9th), in each of which the certification was to the effect that "the grounds of appeal are so frivolous as to show that the appeal is not taken in good faith."

appellate court if application for leave to appeal is made to it. *Smith v. Johnston, supra.*

The only issue here, therefore, is as to the scope of review by this Court. From a strict technical viewpoint, it may be said that the sole question before the Court is whether the Circuit Court of Appeals for the Ninth Circuit abused its discretion in refusing to find merit in petitioner's application for leave to appeal *in forma pauperis*, and that, on a finding of merit in the application, the cause should be remanded to the Circuit Court of Appeals for decision. Several factors, however, should lead the Court not to take such a narrow view of the present proceeding. First, the Circuit Court of Appeals has, by its denial of the petitioner's application, already indicated that it believes petitioner's appeal is without merit. A remand for its reconsideration, therefore, is futile and unnecessary, for the decision is foreclosed and petitioner would again have to seek relief in this Court. Second, a remand to the Circuit Court of Appeals would not necessarily guarantee even a decision by that Court. The appeal *in forma pauperis* having been allowed pursuant to the mandate of this Court, a petition for a writ of certiorari before judgment pursuant to Section 240(a) of the Judicial Code, as amended, would immediately return the cause to this Court for decision on the merits. Finally (and in a petition for *habeas corpus* we believe most importantly) the decision has already been long delayed (almost exactly two years have elapsed since the petition was filed); the issues raised by the petition are substantial in the highest degree; and it is important not only for petitioner but for the Government that they be settled as soon as possible. We urge that the issues discussed below be considered fully to the end that the mandate of this Court may indicate the ultimate disposition of this case. In the discussion which follows, therefore, we treat the issues as directly raised.

II.

The so-called "Writ of Habeas Corpus" filed December 14, 1939, was not a valid writ.

On December 8, 1939, after the petition, return and traverse had been filed, District Judge Welsh witnessed a so-called "Writ of Habeas Corpus", and on December 14, 1937, this document was filed (R. 18). It commanded the Warden at Alcatraz to:

"* * * have the body of Forrest Holiday * * * before the United States Commissioner for the Northern District of California, Southern Division, at the Administration Building of the United States Penitentiary at Alcatraz, * * *; then and there to do, submit and receive whatsoever the United States Commissioner shall then and there consider in that behalf."

That writ, we submit, is not and cannot be considered as a writ of *habeas corpus*, because it commands respondent to bring the body of petitioner before a United States Commissioner instead of before the judge who granted the writ.

A. THE STATUTES WHICH PRESCRIBE THE PROCEDURE ON WRITS OF HABEAS CORPUS HAVE NOT BEEN OBSERVED.

The question; being one of procedure, is governed by what the statute requires. *Walker v. Johnston*, No. 173, Present Term, (pamphlet p. 6). There are at least three sections of the Revised Statutes which prescribe the procedure on writs of *habeas corpus* which are violated by the procedure adopted in the present case:

First, the so-called writ does not comply with R. S. Secs. 757 and 758 (U. S. C., Title 28, Secs. 457, 458). These two sections, which may conveniently be discussed together, require that "The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is

returnable the true cause of the detention of such party" (Sec. 757), and that "The person making the return shall at the same time bring the body of the party before the judge who granted the writ" (Sec. 758).

These two sections do not, it is true, exactly parallel one another, although they are both derived from Section 1 of the Act of February 5, 1867 (c. 28, 14 Stat. 385).¹⁰ The former seems to permit the answer to be returned before any court, justice or judge having jurisdiction. The latter makes mandatory the production of the body of the prisoner before the issuing judge. Probably, having in mind the history of the writ¹¹ and its classic form,¹² not merely the body but also the return must be brought before the issuing judge. The ambiguity, however, if any there be, goes only to the return of the answer. The mandate of R. S. Sec. 758 is clear: "bring the body of the party before the judge who issued the writ".

Second, and equally obvious, we submit, is the fact that the so-called writ does not comply with the mandate of R. S. Sec. 761 (U. S. C., Title 28, Sec. 461). That section requires that "The court, or justice or judge shall * * * determine the facts of the case *by hearing the testimony* * * *" (italics supplied). The fundamental importance of that guarantee was emphasized in *Johnson v. Zerbst*, 304 U. S.

¹⁰ The differences, in language apparently originated in the Revised Statutes. The Act of 1867, Section 1, provides simply that the person to whom the writ is directed "shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person * * *"

¹¹ Holdsworth, *History of English Law*, Vol. I, pp. 202, 227; Vol. IX, pp. 118-120. It is well recognized in both England and the United States that a prisoner has a right to apply to successive judges for writs of *habeas corpus*. *Cox v. Hakes* (1890), 15 A. C. 506, 514; *Salinger v. Loisel*, 285 U. S. 224. Cf. *Kessler v. Strecker*, 307 U. S. 22, 25. This practice plainly implies that a petitioner can select his own judge, and cannot be remitted to some judge he does not select.

¹² See *McNally v. Hill*, 293 U. S. 131, 137, n. 2; *Craig v. Hecht*, 263 U. S. 255, 269.

458, 466, and was reemphasized in *Walker v. Johnston*, *supra*.

The whole procedure was summarized in the *Walker* case. There the issue was as to the propriety of deciding issues of fact on applications for *habeas corpus* on affidavits alone. The Court stated (pamphlet at p. 6):

"In other circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received * * * *Nothing less will satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.'*" (Italics supplied.)

The Government may attempt to avoid the terms of the statute in two ways. First, it may argue that the command to bring the body of petitioner before a United States Commissioner was equivalent to a command to bring the body before "the judge who granted the writ". Or, second, it may urge that the person before whom the body of petitioner is brought is irrelevant since the judge has approved the Commissioner's report. Neither response is meritorious.

1. The first response seems to have been the view of Judge Welsh. The so-called writ (R. 18), quoted above, did not refer the matter to the United States Commissioner for a report on the facts. The language of the so-called writ was in the form of the historic writ in use in the Federal courts (*McNally v. Hill*, 293 U. S. 131, 137, n. 2) and assumed, apparently, that the Commissioner was to dispose of the case completely. There seems to have been no opportunity afforded for filing exceptions to the Commissioner's report—indeed there seems to have been no notice whatever ac-

corded petitioner of any review of the Commissioner's findings and conclusions. Petition for Certiorari, p. 3.^{12a}

Perhaps it should be stated, by way of explanation, that all of the procedural steps in the present case were taken some time prior to the decision of this Court in *Walker v. Johnston*, *supra*, on February 10, 1941. But while that may be an explanation, it is certainly not a justification. This first response to our argument flies directly in the teeth of the statute, and in the teeth of the admonition given by this Court in *Walker v. Johnston* that "The question is what the statute requires". We submit, in other words, that there can be no question of equivalence.

But the plain fact is that the two commands are not equivalents. A United States Commissioner is an inferior officer of the courts, appointed by them pursuant to the Constitution, Article II, Section 2. *In the matter of Hennen*, 13 Pet. 230; *Todd v. United States*, 158 U. S. 278, 282. He is removable at will by the appointing court. U. S. C., Title 28, Section 526. He is a ministerial officer,¹³ and he has been held, for many purposes, to be not a "court".¹⁴ He is not "a judge", and certainly he is not "the judge who granted the writ". He may, like other lawyers, accept references pursuant to an order of a court.¹⁵ His usual functions,

^{12a} See footnote 5a, *supra*.

¹³ *United States v. Berry*, 4 Fed. 779, 780 (D. Colo.).

¹⁴ *Todd v. United States*, 158 U. S. 278, 282; *The Mary*, 233 Fed. 121 (W. D. Wash.); *In re Perkins*, 100 Fed. 950 (E. D. N. C.); *Nixon v. United States*, 82 Fed. 23 (E. D. Tenn.); *Ex parte Perkins*, 29 Fed. 900, 909 (C. C. D. Ind.).

¹⁵ The statute fixing the fees for Commissioners provides, *inter alia*, that he shall be entitled "for attending to a reference in a litigated matter, in a civil cause at law, in equity or in admiralty, in pursuance of an order of the court, \$3 a day." Act of May 28, 1896, c. 252, Sec. 21, 29 Stat. 184, U. S. C., Title 28, Sec. 597. This statute merely sets the fee, and obviously does not give the Commissioner a standing any higher than that which any lawyer would have. Compare the status of a referee under the Bankruptcy Act, who functions in practically all respects as a court of first instance in bankruptcy. See *Report, Attorney General's Committee on Bankruptcy Administration* (1941), pp. 3-10.

however, relate to arrests, bailments, subpoenas and recognizances.¹⁶)

The general nature of the Commissioner's office has not been changed by the recent statute giving them jurisdiction to try, with the consent of the defendant, persons accused of petty offenses "in any place in which Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction."¹⁷ Even under that statute, they are still not judges. But even if this statute did alter their status, it would be irrelevant here, since the statute was enacted on October 9, 1940, and no proceedings were taken in the District Court in the present case after August, 1940 (R. 66).

¹⁶ The relevant statutes, as they were in 1931, are summarized in *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 353, n. 2:

"The powers and duties of United States commissioners include: To arrest and imprison, or bail, for trial (18 U. S. C., § 591; see also §§ 593-597) and in certain cases to take recognizances from witnesses on preliminary hearings (28 U. S. C., § 657); to issue warrants for and examine persons charged with being fugitives from justice (18 U. S. C., § 651); to hold to security of the peace and for good behavior (28 U. S. C., § 392); to issue search warrants (18 U. S. C., §§ 611-627; 28 U. S. C., § 1195); to take bail and affidavits in civil causes (28 U. S. C., § 758); to discharge poor convicts imprisoned for non-payment of fines (18 U. S. C., § 641); to institute prosecutions under laws relating to the elective franchise and civil rights and to appoint persons to execute warrants thereunder (8 U. S. C., §§ 49, 50); to enforce arbitration awards of foreign consuls in disputes between captains and crews of foreign vessels (28 U. S. C., § 393); to summon master of ship to show cause why process should not issue against it for seaman's wages (46 U. S. C., § 603); to take oaths and acknowledgements. 5 U. S. C., § 92. 28 U. S. C., § 525."

See also the summary contained in *United States v. Alured*, 155 U. S. 591, 594-595. The only important amplification of the list in the past ten years is the statute referred to in the next footnote.

¹⁷ Act of October 9, 1940, c. 785, 54 Stat. 1058, U. S. C., Title 18, Sec. 576 *et seq.* See also Order of January 6, 1941, United States Supreme Court, promulgating the Rules of Procedure and Practice for the Trial of Cases before Commissioners and for Taking and Hearing of Appeals to the District Courts of the United States.

Grin v. Shine, 187 U. S. 181, is not to the contrary. There a United States District Judge, in connection with extradition proceedings, issued a warrant of arrest directing that the fugitive, when arrested, should be brought before a United States Commissioner for further proceedings. Objection was made to this procedure, but the Court pointed out that the United States Commissioner, like a judge, had statutory power to issue such a warrant and hold such a hearing. The procedure was not objectionable, in other words, because the warrant was "made returnable before another officer, having the same power and jurisdiction to act" (187 U. S. at 188). Cf. *Blagich v. Tope*, 76 F. (2d) 995 (App. D. C.). Here the case is wholly different; admittedly the United States Commissioner has no power to dismiss writs of *habeas corpus* or to remand or discharge prisoners.

Plainly, therefore, the so-called writ cannot be sustained as the equivalent of the usual writ. The command to produce petitioner's body before the United States Commissioner was no more equivalent to a command to produce his body before a judge than a command to produce it before any person duly appointed as special or standing master or auditor would have been.

2. The Government may, however, fall back to the position that even if the writ did have a defect in form, that defect was cured, as a matter of substance, by the subsequent "approval" of the report of the Commissioner by the judge.¹⁸ We submit that this additional argument runs counter to the mandate of the statute, the practice of the courts, and the underlying policies recently and clearly enunciated by this Court.

¹⁸ As we have already pointed out, there was no provision made for such approval in the so-called writ (R. 18), and the hearing on the basis of which such approval was accorded was apparently done without notice to petitioner or his counsel. Pet. for Cert., p. 3.

The statutes which prescribe the procedure to be followed when a writ of *habeas corpus* is issued have already been stated and discussed. Their command is conclusive.¹⁹ It is futile to say, in view of this particularity, that arguments on the approval of a master's or auditor's report constitute compliance with the requirement, for example, that the "judge shall * * * determine the facts of the case by hearing the testimony". R. S. Sec. 761. See also R. S. 757, 758, *supra*.

Under those statutes an argument *ab inconvenienti* is inadmissible. Even if it were not, however, it is not convincing. In the first place, most judges, even in busy districts, do not find it necessary to violate a plain congressional mandate. A few other district courts seem to have also been lax in ordering issues of fact arising upon the issuance of a writ of *habeas corpus* to be referred to a special master or auditor. There appear to have been similar cases in the same district court,²⁰ a few more in the Southern District of New York,²¹ and a few more elsewhere.²² Only *Kelly v. Johnston* and *Ex parte Sharp*, however, re-

¹⁹ The statement in *Storti v. Massachusetts*, 183 U. S. 138, 143, that "all the freedom of equity procedure" is prescribed by the command "to dispose of the party as law and justice require" (R. S. Sec. 761) is not to the contrary. We believe that, within the framework of the statute, the judge has discretion as to the necessary extent of the inquiry, the range of evidence and the like. But the casual remark of the Court, not directed at the present issue, cannot be taken as a decision that a reference to a master is a proper proceeding. The command to proceed "in a summary way" means only that the court should proceed with "promptness". *Storti v. Massachusetts*, at p. 143.

²⁰ *Gee Fook Sing v. United States*, 49 Fed. 146 (C. C. A. 9th); *In re Tsu Tse Mee*, 81 Fed. 702 (N. D. Calif.); *Kelly v. Johnston*, 111 F. (2d) 613 (C. C. A. 9th).

²¹ *United States ex rel. Chin Cheung Nai v. Corsi*, 55 F. (2d) 360 (S. D. N. Y.), affirmed 64 F. (2d) 1022 (C. C. A. 2d); *United States ex rel. Fong On v. Day*, 39 F. (2d) 202 (S. D. N. Y.); *United States ex rel. Devenuto v. Curran*, 299 Fed. 206 (C. C. A. 2d), (see 39 F. (2d) at pp. 203-204).

²² *Ex parte Sharp*, 33 F. Supp. 464 (D. Kans.). The practice in courts not controlled by the Federal statutes can have, of course, little bearing on the proper procedure in the Federal courts. It does appear, however,

lated to alleged unlawful imprisonment on a criminal charge, and only in *Kelly v. Johnston* was the practice challenged. The answer of the court was completely and demonstrably untenable.²³

Diligent research by Government counsel may unearth a few more instances. But even if a hundred could be produced, the argument that such a procedure was essential would be unconvincing. The great majority of the Federal courts follow the command of the statute. Judge Underwood, sitting *alone* in the Northern District of Georgia, in which is located the Atlanta Penitentiary, has found it possible to follow the statute. Certainly, then, it should be possible for *four* judges in the Northern District of California to do the same.

Second, and wholly apart from the command of the statute and the ability of most Federal judges to follow it, we submit that the practice is completely inconsistent with the

that under some circumstances the reference of fact issues to special masters has been practiced in England and in some state courts. See *Case of the Hottentot Venus*, 13 East 195 (K. B. 1810); *In re Meyer*, 146 App. Div. 626 (but see *People ex rel. Glendening v. Glendening*, 259 App. Div. 384). The decisions in Pennsylvania give no clear indication whether the courts there may decide questions of law without the production of the petitions, or whether they may also decide questions of fact. See *Commonwealth v. Cur-j*, 285 Pa. 289; *Commonwealth ex rel. O'Neil v. Ashe*, 337 Pa. 230; *Commonwealth ex rel. Zimbo v. Zoretskie*, 124 Pa. Super. 154.

²³ In the *Kelly* case the court states the proceedings after the filing of the petition for the writ (111 F. (2d) 614): "The court issued an order requiring appellee to show cause why the writ should not issue. Appellee filed a return, appellant filed a traverse, a hearing was had, evidence was taken, findings were made, and an order was entered denying the petition." On those facts, the court denied the applicability of R. S. Sec. 758, *supra*, stating "The section has no application to this case, for in this case no writ was granted", citing *Ex parte Yarbrough*, 110 U. S. 651, 653. Plainly, however, the court misconstrues the *Yarbrough* case. If a hearing was had, and evidence taken, it should have been *after* the writ issued. *Walker v. Johnston*, *supra*. The court appears to have confused the issuance of the writ with the discharge of the petitioner. If the petition is fair on its face, and the ultimate issue was one of fact, the statute requires that the writ issue. R. S. Secs. 755, 758. *Ng Fung Ho v. White*, 259 U. S. 276, 285. The same confusion is evident in the present record: the order of the District Court at the time of the approval of the Commissioner's report is entitled "Order Denying Application for Writ of Habeas Corpus" (R. 66).

policy laid down in prior decisions of this Court.²⁴ Here the issue at stake is the right of personal liberty. Had there been no dispute of *fact*, there would be no need for petitioner to appear in court. The legal questions can be settled in his absence. *Ex parte Yarbrough*, 110 U. S. 651; *Murdock v. Pollock*, 229 Fed. 392 (C. C. A. 8th). He need not be accorded the privilege of arguing his own case on appeal. *Dunlap v. Swope*, 103 F. (2d) 19 (C. C. A. 9th). But those were not the situations here. In the present case a man was matching his word against the word of others. He was in prison; they were not. Certainly the only hope he had of convincing the judge that he was to be believed was his demeanor on the witness stand—his willingness to testify, his attitude on cross-examination, his sincerity, and all of the other imponderables which have led courts from ancient times to accord extra weight to the judgment of the judge who heard and saw the witnesses.²⁵

Fundamentally, there is little difference in the procedure here adopted and the procedure, in the same court, condemned in *Walker v. Johnston*, of trial on affidavits. In each case the petitioner is matching document against document. In each case the essence of a judicial inquiry is absent.²⁶ *Johnson v. Zerbst*, 304 U. S. 458, 466.

²⁴ Compare also the policy against references to masters contained in Rule 53(b) of the Rules of Civil Procedure, which makes a showing of an "exceptional condition" a prerequisite to a reference in even a non-jury case. See Point II B, *infra*.

²⁵ Particularly is it true that petitioner will not be accorded a "judicial inquiry"—a decision by the *judges*—if, as the Government will no doubt urge, Rule 53 of the Rules of Civil Procedure is applicable. See Point II B, *infra*. Under Rule 53(e) (2) the report of the "master" must be accepted "unless clearly erroneous". Under that Rule the report of the master is plainly more than a finding of fact; his report must be accepted even though the judge might have reached a contrary conclusion. In all but the unusual case it is the decisive determination.

²⁶ Compare the condemnation by the Circuit Court of Appeals for the Sixth Circuit of the similar practice of deciding issues of fact on a writ of *habeas corpus* by reviewing the record in the deportation proceeding. *Chin Hoy v. United States*, 293 Fed. 750 (C. C. A. 6th).

**B. RULE 53 OF THE RULES OF CIVIL PROCEDURE IS
INAPPLICABLE.**

The Government may urge that, notwithstanding any prior practices, Rule 53 of the Rules of Civil Procedure now applies, and authorizes the appointment of a "master" as defined in Rule 53(a).²⁷ We submit, first, that Rule 53 has no application to *habeas corpus* proceedings, and second, that even if Rule 53 were applicable, it can give no support to the procedure in the instant case because the requirements of Rule 53(b) have not been met.

1. Rule 81(a)(2) of the Rules of Civil Procedure provides that in *habeas corpus* proceedings appeals are governed by the Rules

" . . . but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: . . . "

Under that provision there are thus two qualifications, each of which must be met before Rule 53 may be applied here: (1) there must be no governing statutes; (2) there must previously have been conformity with law or equity.

Here, neither condition can be met. The specific provisions of R. S. Secs. 757, 758 and 761, discussed in Point II A, *supra*, are "statutes of the United States" in which "the practice in such proceedings is . . . set forth". And, as we have already pointed out, those statutes are completely inconsistent with the provisions of Rule 53. Moreover, apart from various aberrations in the Ninth and

²⁷ The definition of "master" in Rule 53(a) makes no specific reference to a United States Commissioner. We may assume, however, that the form of the so-called writ (R. 18) can be ignored, and that it can be treated as a reference of the issue of fact to a "special master" described as the United States Commissioner. See Point II A, *supra*.

Tenth Circuits, compare *Walker v. Johnston, supra*, the practice in *habeas corpus* proceedings has generally been governed by statutes which set out in detail the appropriate procedure. R. S. Secs. 751-762; U. S. C., Title 28, Secs. 451-466. Practice has not, in other words, "conformed to the practice in actions at law or suits in equity."²⁸

2. Even if Rule 82(a)(2) does not dispose of the Government's contention, we submit that the contention still must fail because Rule 53 itself has not been complied with, and consequently cannot justify the reference to the United States Commissioner in the present case.

Rule 53(b) prescribes the limitations on the use of masters under Rule 53. After the general statement that masters shall be the "exception", the paragraph provides:

"In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made *only upon a showing that some exceptional condition requires it.*" (Italics supplied.)

Habeas corpus proceedings are, of course, not tried by a jury. R. S. Sec. 761; *In re Neagle*, 135 U. S. 1, 75. Hence, the Rule provides that a reference shall be made "only upon a *showing* that some *exceptional condition* requires it." The background of the Rule indicates clearly that this phrase was intended to have a definite effect in limiting the abdication by the judiciary of its functions. Compare *Ex parte Peterson*, 253 U. S. 300; *Los Angeles Brush*

²⁸ Rule 81(a)(2) may refer to *habeas corpus* proceedings in their entirety, or to any single phase of such proceeding. The result here is not affected in any case. If the matter is confined to the substance of Rule 53, the first condition is not met because Rule 53 conflicts with U. S. Secs. 757, 758 and 761, and the second condition is not met because the few cases cited above show no basis for asserting that *habeas corpus* proceedings have conformed either to the equity practice of special masters, or to the law practice of auditors. *Ex parte Peterson*, 253 U. S. 300.

Manufacturing Corp. v. James, 272 U. S. 701; *McCullough v. Cosgrave*, 309 U. S. 634.

Here there is no "showing"²⁹ in the record of any "exceptional conditions" which warranted the extraordinary procedure adopted in this case. Nor, *dehors* the record, are there facts which can supply the omission. The presence of Alcatraz Penitentiary in the district, which might be suggested as an "exceptional condition" is made irrelevant by the ability of a single judge to handle the *habeas corpus* proceedings originating from the Atlanta Penitentiary.

C. IN ANY EVENT, THE PROCEDURE HERE WAS IMPROPER.

Finally, we urge that if, for any reason, the Government should prevail on this issue, and succeed in establishing the propriety of a reference to a special master in *habeas corpus* proceedings, nevertheless this Court should not sanction the manner in which that device was here utilized.

First, the hearing before the United States Commissioner³⁰ was held in the "Administrative Building of the United States Penitentiary at Alcatraz" (R. 18). No "judicial" or even semi-judicial hearing can be held in such an atmosphere. We speak of imponderables, and, of course, cannot demonstrate prejudice. Nevertheless we believe a prisoner seeking his freedom is entitled to the opportunity to testify outside and away from the influence of his prison and warden.

²⁹ The obvious import of the word "showing" is that only in the most exceptional circumstances should the reference be made other than at the request of one of the parties, accompanied by valid reasons. See Moore, *Federal Practice*, Vol. III, Sec. 53.03.

³⁰ There may be some question as to the propriety of the use of a United States Commissioner as a special master. As we have shown above, he is essentially a committing magistrate, and as such is not apt to be favorably disposed to any attempt, however meritorious, by a prisoner to achieve his discharge.

Second, the Commissioner has plainly rendered his report and made his findings of fact and recommendations on the basis of several erroneous conceptions.

(a) His statement of the legal principles which he applied (R. 31) show that he believed that "Supporting affidavits are proper evidence in *habeas corpus* proceedings." Unquestionably, that was error. *Walker v. Johnston supra*.³¹ Here the error was particularly vital, since the "Certificate" of Judge Miller (R. 15) which the Commissioner quoted at length (R. 29) and relied on under his erroneous view of the law, was peculiarly important because it was the statement of the sentencing judge. Other persons, the United States Attorney and the Deputy Marshal, might be expected to lack, in some degree, the judge's impartiality. Had the "Certificate" been excluded, the Commissioner might well have reached a contrary conclusion.

(b) Actually, the reliance on the "Certificate" was an even more flagrant error. It will be noted that the "Certificate" is not sworn to, or verified in any way. Apparently the assumption is that merely by stating that he "certifies" a fact, a judge can give a simple, unsworn statement a standing as evidence. This, we submit, is erroneous. A "certificate" which is sworn to would be entitled to be treated as an affidavit (though even then there could be no warrant for trying to give it a higher level of probative value by calling it a "certificate" rather than an "affi-

³¹ In the *Walker* case, the Court stated of the affidavits filed with the return to the rule (as these were here) that they "only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination *ore tenus* or by deposition as are all other witnesses" (Italics supplied).

davit"). A "certificate", not verified, is no evidence whatever.³²

This double error of the United States Commissioner was not cured by the District Court at the hearing on the report (R. 66). No reference is made to the law which the Commissioner had applied, but since the practice in the Ninth Circuit at that time (July 1, 1940) was to consider affidavits—indeed, to consider only affidavits—see *Walker v. Johnston*, it can fairly be assumed that the error of the Commissioner was not corrected, and was perpetuated in the conclusion of the trial court. If the judge made an independent evaluation of the facts, he, too, might have reached another conclusion had the "Certificate" been excluded.³³

Third, and directly related to the second point, is the failure of the judge to make any findings of fact, to which petitioner is clearly entitled. *Moore v. Dempsey*, 261 U. S. 86, 92; *Johnson v. Zerbst*, 304 U. S. 458. Compare *White v. Johnston*, No. 697, Present Term, in which the decision was reversed and the cause remanded to the District Court of the United States for the Northern District of California upon a confession of error by the Solicitor General, due to an absence of findings of fact. The practice of the

³² There are many instances in which certificates may be properly made by a District Judge, and in such circumstances there is no need that the certificate be verified. Compare the certificate authorized by Section 832, Title 28, U. S. C. (Appendix, *infra*) with respect to applications to appeal *in forma pauperis* (Cf. R. 68-69). We have been unable to find any statute, however, which authorizes a judge, acting in the capacity of a witness, to "certify" facts.

³³ Of course, it is no answer to assert that this error is immaterial because, on a remand, a deposition from Judge Miller may be obtained to the same effect as the "certificate". It is precisely because the deposition is different, and may reveal other facts, that this Court condemned affidavits in the *Walker* case. Moreover, the deposition would be under oath.

District Court in the present case is tantamount to no findings at all. The statement in the Order (R. 66) that the Commissioner's report was "approved" does not indicate whether the court adopted all of the so-called "Findings of Fact" (R. 30) (most of which are not findings of fact, in any sense, but mere conclusions) or whether he merely "approved" the Commissioner's "Recommendation" (R. 32) that the "application be denied." The similarity of the error in terminology (or perhaps in substance, see footnote 23, *supra*) between the "Recommendation", just quoted, and the Order of the court (R. 66) that the "application . . . be and the same is hereby denied" indicates strongly that the judge did not himself "approve" anything but the ultimate conclusion.

Fourth, the procedure in the district court was cast throughout in such a form as to deny petitioner the right to be heard on the approval of the report of the Commissioner. As we have already pointed out (Point II A, *supra*) the order of reference (R. 18)—the so-called "writ of *habeas corpus*"—seemed to contemplate that the Commissioner would take final action. Certainly it set no time for the report to the court. The Order (R. 66) does not recite that notice was accorded to petitioner or his attorney, and the Petition for Certiorari categorically denies that any such notice was given (p. 3). Certainly there was no notice accorded petitioner of the filing of the Commissioner's report (R. 71) and no opportunity, therefore, for filing exceptions.^{33a} While this opportunity is not, perhaps, essential to due process, *Morgan v. United States*, 298 U. S. 468, 478, it is certainly preferred practice, and much more apt to result in ultimate justice. *Morgan v. United States, supra*; *Morgan v. United States*, 304 U. S. 1, 19-20. The whole matter was handled in such a confused manner as sub-

^{33a} See footnote 5a, *supra*.

stantially to deny to petitioner fundamental rights to which he is entitled.

It may be urged by the Government that the errors mentioned above may not now be raised, because exceptions were not preserved. The Court has indicated, however, in *Walker v. Johnston, supra*, in which the same situation prevailed, that in cases such as this it will notice plain errors, even though not assigned. See also *Mahler v. Eby*, 264 U. S. 32, 45; *Kessler v. Strecker*, 307 U. S. 22, 34. Moreover, it is essential to orderly administration of justice that the procedure of the courts in the Ninth and Tenth Circuits be reviewed, and if necessary, corrected. Cf. *Walker v. Johnston, supra*; *White v. Johnston, supra*.

We submit, therefore, that the Court should remand the case with instructions to hold a judicial hearing before the judge on the issues of fact raised by the petition, ~~the~~ response and the traverse. Even if a hearing before a master be held proper, however, we submit that the case should be remanded for a proper determination of the facts according to law.

III.

The decision below may not be sustained on the ground that no writ should have issued.

The Government may urge, as it did in *Walker v. Johnston, supra*, that irrespective of the impropriety of the proceedings in the district court, the decision below should be affirmed on a wholly different ground, viz. that the writ of *habeas corpus* should never have issued at all. If it does so urge, we submit that the contention is without merit.

The salient facts have already been stated, but it may

be well to summarize them briefly here.³⁴ Petitioner was indicted for a serious crime—robbing a bank. At his trial in North Dakota, he did not have counsel. He was, at that time, ignorant of the fact that he was entitled to have counsel appointed for him if he could not afford counsel. He was not informed of his right to counsel by the district court. He did not waive counsel.

He was induced to plead guilty by several erroneous statements made to him by officials of the Department of Justice. They told him, falsely, that the maximum sentence which he might receive if he stood trial and were convicted would be 80 years. They told him, falsely, that they would recommend a sentence of ten years if he pleaded guilty. They told him, falsely, that if he stood trial and attempted to bring in witnesses that the witnesses would each receive a ten-year sentence.

He was taken to a different state after these representations had been made, and kept in a prison ward, isolated, for four days. When he came into court he heard the indictment for the first time, when it was read by the prosecuting attorney. He was induced to plead guilty to *two* counts of an indictment, which the Government now admits stated but one offense, by an erroneous statement by the judge, in the nature of legal advice on the proper construction of the indictment.

We submit that these facts state a case of denial of the assistance of counsel guaranteed in the Fifth and Sixth Amendments to the Constitution.

³⁴ None of the essential facts, but much of the detail, is found in petitioner's testimony under oath before the Commissioner. Although these facts were not made in the petition and traverse, they were made under oath, and should, for present purposes, be regarded as an amendment elaborating the petition. Particularly is this so since the Government is seeking to sustain the decision on a ground different than that adopted by the district court. Any other course would simply compel the filing of a new petition with the facts fully elaborated. We submit that there has already been enough delay.

A. THE DECISIONS OF THIS COURT ARE CONTROLLING IN
PETITIONER'S FAVOR.

This Court has recently decided several cases which state the scope of the "assistance of counsel" clause of the Constitution. *Powell v. Alabama*, 287 U. S. 45; *Johnson v. Zerbst*, 304 U. S. 458; *Avery v. Alabama*, 308 U. S. 444; *Frame v. Hudspeth*, 309 U. S. 632; *Walker v. Johnston*, *supra*. We submit that those decisions, particularly in *Johnson v. Zerbst* and *Walker v. Johnston*, are directly controlling here.

In *Johnson v. Zerbst*, the petitioner, an enlisted man in the United States Marine Corps, was arrested with another marine, charged with feloniously uttering, passing and possessing counterfeit Federal Reserve notes. They were represented by counsel at preliminary hearings before a United States Commissioner. Two months later, they were indicted. Two days thereafter they were arraigned and pleaded not guilty. They stated then that they had no lawyer and, in response to an inquiry of the court, stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of counsel. The lower courts denied relief in a *habeas corpus* proceeding, but on review this Court held that the petitioner was entitled to be discharged if on remand the lower court should find that petitioner had not competently waived his right to counsel. The Court, quoting from *Powell v. Alabama*, 287 U. S. 45, 69, stated that even an intelligent layman has little knowledge of law, and continued:

"If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or

otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

In *Walker v. Johnston, supra*, the petitioner was an escaped life term convict. He was charged with bank robbery, with an accomplice, while he was at large. He was returned to the penitentiary in New Mexico where he was serving a life term, and was brought from there to Texas on April 25, when he learned that he was charged with bank robbery. Between April 25 and April 28 he talked to the United States Attorney and his assistant, who urged him to plead guilty. He asked for a continuance so that he might communicate with relatives and try to raise money for an attorney, and he asked to see his co-defendant or his attorney. The United States Attorney refused both requests, and told him that if he pleaded not guilty he would get double the sentence that would be imposed if he pleaded guilty. His co-defendant was convicted. He did not know he was entitled to counsel unless he had money, and he was not told of this right. He denied, but only on the ground that he had no knowledge sufficient to form a belief, that he wrote a letter to the United States Attorney after sentence had been imposed in which he expressed satisfaction with the result. Again, in this case, the lower courts denied relief on *habeas corpus*. Again, this Court reversed the decisions below, and held that if petitioner could establish his allegations by proof, no opportunity to do so having been afforded him by the court below, he was entitled to his discharge.

These cases, and particularly *Walker v. Johnston*, have definitely established several propositions which have heretofore been controverted by the Government.

1. The Fifth and Sixth Amendments are not to be limited, as some judges have indicated, to a bare right to have coun-

sel in court. See *Saylor v. Sanford*, 99 F. (2d) 605, 607 (C. C. A. 5th) (Sibley, J., concurring) certiorari denied 306 U. S. 630. We are not sure from a reading of the brief for the Government in the *Walker* case whether or not the extended discussion there of this position (pp. 32-35) was an attempt to advocate its adoption by this Court. Perhaps it was not, but in any event the decision in the *Walker* case effectively disposes of it.

2. It is irrelevant that petitioner here pleaded guilty. Such was the case in *Walker v. Johnston*. See also *Frame v. Hudspeth*, *supra*. Under the *Walker* decision, therefore, it is no longer open to the Government to urge that the plea of guilty was, "as a matter of law", a waiver of the right to the assistance of counsel (Government's Brief, No. 173, pp. 43-44). Nor is it open to the Government to urge, as it did very strongly in the *Walker* case (Br. pp. 36-38), that a plea of guilty may be taken to indicate conclusively the lack of need for the assistance of counsel. Both of these contentions were rejected by the *Walker* decision.³⁵

3. It is irrelevant that petitioner had been in court before and had been convicted of a crime. Such was the case in *Walker v. Johnston*, *supra*, in which petitioner was then serving a sentence for another offense. Moreover, the Commissioner in the present case to the contrary notwithstanding, the petitioner's former convictions did *not* enable him to understand and appreciate his rights. He had, on each occasion before, been able to pay for counsel. There is nothing in such experience which would lead him to believe that he could have counsel even if he could not pay. Cf.

³⁵ The only possible basis on which it might be argued that the decision in *Walker v. Johnston* did not decide those issues is that the decision went entirely upon the ground of entrapment. Cf. *Mooney v. Holohan*, 294 U. S. 103. The extended statement of the facts covering the right to counsel (*Walker v. Johnston*, Pamphlet, p. 7) makes this unlikely. Moreover, if that be the ground, that ground is present in a much more aggravated form in the present case. See *infra*.

United States ex rel. Nortner v. Hiatt, 33 F. Supp. 545, 546 (M. D. Pa.).³⁶

4. It is irrelevant that petitioner had had counsel at the preliminary hearings before the United States Commissioner at Kansas City. Such was the case in *Johnson v. Zerbst*; *supra*.

Those contentions, formerly urged by the Government can now be eliminated from consideration. Moreover, there are additional factors, not present in the *Walker v. Johnston* and *Johnson v. Zerbst* cases, which make the Government's position here even weaker than in those cases.

1. Here petitioner was induced to plead guilty by false statements by officers of the Government. In *Walker v. Johnston*, as the Government pointed out in its brief (p. 40), the statements by the United States Attorney were not false. He simply stated that a prisoner will receive a more favorable sentence if he pleads guilty—"one of the facts of life which it is not to the disadvantage of a defendant to know". The same certainly cannot be said for the statements made to petitioner here, and which induced his guilty plea.

2. In the present case, the petitioner had been assured that he would have a recommendation from officers of the Department of Justice that his sentence should be ten years. Instead, he received what is, in effect, a twenty-five year sentence, no recommendation at all having been made in his behalf. In *Walker v. Johnston*, the sentence conformed precisely to the petitioner's expectations and he probably expressed himself as completely satisfied with it.

3. The prejudice to petitioner is even more strikingly

³⁶ The petitioner's prior convictions would appear to go, in any event, only to the truth of his allegation of ignorance of his rights. Of course, petitioner can not secure his discharge until he proves the facts, but that question can have nothing to do with the present issue—whether a writ should have issued.

shown in the false legal advice given by the judge in interpreting the indictment, which resulted in petitioner being given two sentences, to run consecutively, for the same offense. The Government now concedes that at least one is invalid—that the sentence, in other words, is grossly excessive. In *Walker v. Johnston*, the indictment was admittedly valid and proper, as was the sentence.

4. In *Walker v. Johnston*, the sentencing judge, through the medium of the trial of the petitioner's co-defendant, became convinced of the petitioner's guilt, and the minutes of the sentence so recited (Record, No. 173, p. 11). Here the minutes (R. 8-9) contain no such declaration, and the judge had no such opportunity to determine, apart from the guilty plea, petitioner's guilt or innocence.

With the single exception of the matter about to be discussed, therefore, we submit that the present case is directly controlled by, and, indeed, is *a fortiori* of, the recent decision of the Court. The sole exception is based on the fact that there is no allegation here that petitioner affirmatively requested that counsel be assigned to him. We submit that the argument of the Government is unsound, and that in that respect, too, the present case is controlled by prior decisions of this Court. Moreover, even if prior decisions are not controlling, we submit that the Government's argument, that a request or apparent need is necessary, should be rejected.

The opinion in *Johnson v. Zerbst* gives overwhelming evidence that this Court does not believe that a request for counsel is vital. The Court there states (p. 464): "The Sixth Amendment withholds from Federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." Again, the Court states (p. 465): "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court,

in which the accused—whose life or liberty is at stake—is without counsel.” Again (p. 468): “If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction * * *.” And, lest there be doubt as to the use of the term “Waiver”, the Court points out (p. 464) that “A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege”, and that “‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights.”

These statements can have but one meaning—that an accused is entitled to be informed of his right to counsel, or that, stated differently, an accused does not forfeit his right to the assistance of counsel simply because he does not know that it exists. See also *Powell v. Alabama*, 287 U. S. 45, 71.

Indeed, in its brief in *Walker v. Johnston* the Government conceded (p. 36) that the Court had indicated in *Johnson v. Zerbst* that a defendant did not forfeit his right to the assistance of counsel simply through ignorance of that right. In effect, the Government requested a reconsideration of that decision. The effect of the opinion in *Walker v. Johnston* is to indicate that the position of the Court has not changed since 1938, and that *Johnson v. Zerbst* still states the position of the Court.

The Government may urge that the question was not reconsidered in *Walker v. Johnston*, because the opinion was concerned in large part with a procedural issue. Quite plainly, that is not the case. In *Walker v. Johnston* the Court accepted as an element in the petitioner's case that he was ignorant of his right to the assistance of counsel if he was unable to employ counsel. See Pamphlet, p. 7. The same situation is present here. Under those circumstances the petitioner in *Walker v. Johnston* could not have re-

quested counsel. A man cannot request the enforcement of a right which he does not know exists. Necessarily, the holding in *Walker v. Johnston*, that if the petitioner there could establish his allegations he would be entitled to his discharge is a holding that a *request* is not an essential part of a petitioner's case.³⁷

The Government may urge, however, that there was a "request" in the *Walker* case, to which the Court adverted in its opinion. Pamphlet, p. 7. As we have already stated, there could be no request, in the sense in which the Government now urges, because the petitioner in *Walker v. Johnston* was admittedly in ignorance of his right, and could not request the enforcement of what he did not know existed. Giving to the case its strongest possible interpretation,³⁸ the *Walker* case differs from the present only to the extent that there is a difference between a man who, not knowing he could have counsel even though unable to pay for counsel, says, in the presence of a Government official, "I wish I could afford a lawyer", and another man, also ignorant of his rights, who only *thinks* such thoughts, or does not say them when anyone is listening. Certainly the Court will not make a constitutional right depend on his chance outward expression of what, for the man who is not aware of his rights, can be only a wishful thought.

The Government may say, however, that there is a distinction between the man who makes a wish out loud, and the man who does not, because the former has indicated his

³⁷ The reaffirmance of *Johnson v. Zerbst* is also indicated by the citation of that case as amplifying the definition of "waiver". The Government, as we have already pointed out, concedes that if the *Johnson v. Zerbst* definition of waiver be accepted, there can be no waiver unless the defendant is aware of his rights.

³⁸ The Government urged (Br. No. 173, p. 39) that the request—being for his co-defendant or his co-defendant's counsel—was equally susceptible of being considered as a request for an opportunity to discuss the effort of the United States Attorney to induce him to testify for the Government, and therefore could not be considered as a request for counsel at all.

need for counsel, which should therefore be offered to him. Whether a distinction so fundamentally intangible can be supported on that ground need not be decided here. Petitioner here was plainly in need of counsel. He was induced to plead guilty by false statements. He was given erroneous legal advice by the sentencing judge. He was sentenced on two counts, at least one of which was invalid, the sentences to run consecutively.

Petitioner's situation, in other words, was substantially worse than that of the petitioner in the *Walker* case. If the request of petitioner there to talk to his co-defendant or his attorney indicated the need of counsel, that factor is matched here by the several factors enumerated above.³⁰

Indeed, for these same reasons, we submit that even on the Government's own statement of the limits of the constitutional right—that it is available only to the men who request counsel or who are in apparent need of counsel—the decision here should be against the Government's contention that the writ need not have issued. The needs of petitioner were apparent.

B. THE GOVERNMENT'S POSITION IS CONTRARY TO BOTH THE HISTORICAL BACKGROUND OF THE SIXTH AMENDMENT AND TO THE MODERN AUTHORITIES.

We submit, therefore, that the recent decisions of this Court have established that a request or apparent need for counsel is not a prerequisite to the invocation of the constitutional guarantee of the assistance of counsel. In other words, we submit that the constitutional guarantee entitles a defendant in a criminal prosecution to be informed

³⁰ It is no answer to say that the United States Attorney and the judge in North Dakota were unaware of the prejudice. The United States Attorney certainly should have inquired of the circumstances under which petitioner signed the statement in Missouri, and should have brought the facts to the attention of the judge. The judge himself was aware of the advice which he gratuitously accorded.

by the court that he is entitled to counsel selected by himself, or, if he is indigent, to counsel selected and assigned to him by the court.

These recent authorities are fully supported by the historical background of the Sixth Amendment. The detail of that history has recently been set forth fully and lucidly by distinguished counsel in the Brief for Petitioner in *Walker v. Johnston*, No. 173, pp. 20-30.⁴⁰ As is there shown, the discussion in State conventions of the Bill of Rights which were to be added to the Constitution immediately after its adoption dealt to a large extent with criminal procedure. Particularly in the Pennsylvania convention, and to a lesser extent in the Virginia convention,⁴¹ it is apparent that the framers of the Bill of Rights did not intend to follow the English common-law rule—that a prisoner was not entitled to counsel except upon a point of law—which had been criticized by the editions of Blackstone then current in the colonies.⁴² See *Powell v. Alabama*, 287 U. S. 45, 60, *et seq.* We cannot, therefore, use the English common law as a guide to the interpretation of the language of the Sixth Amendment.

There are, however, some guides. There were certainly, in the first Congress, which drafted the Bill of Rights,

⁴⁰ We have summarized below only that portion of the historical materials and the modern authorities set out in the *Walker* brief which bear upon the necessity for a request. The abundant proof there set forth that an accused has, under the Sixth Amendment, a right to counsel at the time of the arraignment, is not set out, for the reason that we regard that issue as concluded by the *Walker* decision. See *supra*.

⁴¹ See also the New York and Rhode Island Bills of Rights in *Documents Illustrative of the Formation of the Union of the American States* (1927), pp. 1036, 1053.

⁴² Blackstone, *Commentaries*, Book IV, p. 355: "But it is a settled rule at common law, that no counsel shall be allowed to a prisoner, upon his trial upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. A rule, which . . . seems to be not all of a piece with the rest of the humane treatment of prisoners by the English law."

echoes of the State Conventions. Again, there were many persons who were undoubtedly profoundly influenced by the contemporary French ideas, just as American ideas were largely influencing many Frenchmen.⁴³ And, as set out in detail in the *Walker v. Johnston* brief (pp. 25-26) several instructions given by the constituencies in France to the delegates to the Etats-Généraux contained provisions such as "Let counsel be assigned to the accused in all cases and from the beginning of the examination."⁴⁴ Again, we know that the phrase "shall enjoy the right . . . to have the Assistance of Counsel for his defense" was given deliberate and particular consideration by Congress. The phrase was inserted in the original draft of the House of Representatives,⁴⁵ stricken by the Senate,⁴⁶ and finally, after the House had insisted on the phrase,⁴⁷ acquiesced in by the Senate.⁴⁸ All of these facts make it highly probable that the Congress intended that an accused should have counsel—selected by him, or, if he was indigent, offered to him and assigned by the court. It used words which would carry out that intention. The phrase "assistance of counsel" would normally mean "the help afforded by counsel".⁴⁹ And the phrase "enjoy the right" would normally mean that the accused would actually possess, use or experience the right.⁵⁰

Modern authorities, too, support our contention that the

⁴³ See Georg Jellinek, *The Declarations of the Rights of Man and of Citizens* (tr. Max Farrand, 1901), p. 18.

⁴⁴ Esmein, A., *A History of Continental Criminal Procedure* (tr. John Simpson, 1913), p. 398.

⁴⁵ 1 Annals of Congress 435, 756, 767.

⁴⁶ 1 Senate Journal 77, 1 Annals of Congress 77. The Senate sent the plan of amendments back to the House due to "a dislike with respect to vicinage". Letter, Madison to Edmund Pendleton, September 14, 1789. *Writings of James Madison* (1865), Vol. I, p. 491, 492.

⁴⁷ 1 Annals of Congress 913; 1 House Journal 121; 1 Senate Journal 87.

⁴⁸ 1 Senate Journal 88.

⁴⁹ Oxford English Dictionary, Vol. I, p. 511, under "Assistance", meaning III. Meaning I apparently became obsolete in the 17th Century.

⁵⁰ *Id.*, Vol. III, p. 188, under "Enjoy", meaning III.

Constitution is violated when a person is arraigned on a serious criminal charge without being offered the assistance of counsel. The rule is so widely adopted that it "reflects if it does not establish the right to have counsel appointed, at least in cases like the present." *Powell v. Alabama*, 287 U. S. 45, 73.⁵¹ The rule is stated in the American Law Institute *Code of Criminal Procedure*, Official Draft, March 16, 1931,⁵² and is buttressed there by the citation of constitutional or statutory provisions in almost every State.⁵³ There are many other modern authorities on criminal procedure to the same effect.⁵⁴

⁵¹ The Official Draft, Section 203, provides:

"Before the defendant is arraigned on a charge of felony if he is without counsel the court shall, unless the defendant objects, assign him counsel to represent him in the cause. Counsel so assigned shall serve without cost to the defendant, and shall have free access to the defendant, in private, at all reasonable hours while acting as counsel for him. Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned him by the court. Failure to assign counsel before arraignment shall not affect the validity of any proceeding in the cause, if it appear that the defendant was subsequently represented by counsel whether assigned to him or of his own choosing and that the defendant was not in fact prejudiced by such failure."

⁵² Official Draft, pp. 630-634.

⁵³ National Commission on Law Observance and Enforcement (popularly known as the Wickersham Commission), *Report on Lawlessness in Law Enforcement*, Vol. IV, pp. 5, 7. See also the special Report annexed thereto at p. 263 *et seq.*, prepared by Zechariah Chafee, Jr., Walter H. Poilak and Carl S. Stern, p. 281. Cf. *Criminal Justice in Cleveland* (a survey under the direction of Roscoe Pound and Felix Frankfurter (1922), p. 311; Raymond Moley, *Our Criminal Courts* (1930), p. 67; Pendleton Howard, *Criminal Justice in England* (1931), pp. 346-349; Reginald Heber Smith, *Justice and the Poor* (Carnegie Foundation for the Advancement of Teaching, 1919), pp. 111-112. See comment on *Powell v. Alabama*, 287 U. S. 45, in Felix Frankfurter, *Law and Politics*, "The Supreme Court Writes a Chapter on Man's Rights," p. 189. At p. 193 it is said that "Not only must there be a court free from coercion, but the accused must be furnished with means of presenting his defense. For this the assistance of counsel is essential. *Time for investigation* and for the production of evidence is imperative." (Italics supplied.) See also the recommendation of the *Report of the Judicial Conference*, October Session, 1940, p. 16, that provision should be made for the appointment of public defenders.

IV.

The consecutive sentences put petitioner twice in jeopardy, contrary to the Fifth Amendment.

The petition (R. 2) and the petition for certiorari (pp. 2, 13-17) raise a second, and completely independent ground upon which the petitioner should have been discharged. That ground relates to the fact that although the two counts of the indictment (R. 3-5) reiterated the same offenses, petitioner was sentenced to separate and *consecutive* sentences on each count.

The Government, we are advised, will not deny that one of the sentences is void for this reason. *Durett v. United States*, 107 F. (2d) 438 (C. C. A. 5th); *Hewitt v. United States*, 110 F. (2d) 1 (C. C. A. 8th), certiorari denied 310 U. S. 641. In all probability the Government will urge, however, that the question of which of the sentences is valid is not now material, since even the lesser sentence has several years to run. Further, it will probably urge that if the question of which sentence is valid were at issue, that the valid sentence is the longer, fifteen-year sentence on the second count. Cf. *Hewitt v. United States*, *supra*. We submit that the issue is before the Court in this proceeding, and that the valid sentence is the ten-year sentence on the first count.

The issue is raised in these proceedings by virtue of the Government's failure to admit that the ten-year sentence imposed on the first count is the valid sentence, and its contention that the fifteen-year sentence imposed on the second count is the valid sentence. If the fifteen-year sentence were the valid sentence, petitioner would now be held under an admittedly invalid ten-year sentence, since the fifteen-year sentence is expressly made by its terms to begin at a time still in the future (R. 9). Under those circumstances,

no valid order would now apply to petitioner, and the writ would not be premature.⁵⁴ *McNally v. Hill*, 293 U. S. 131, in which the valid sentence was the *first* sentence, corresponding to the ten-year sentence here, is plainly distinguishable.

Of necessity, therefore, the Court must decide which of the sentences is valid in order to determine whether or not the writ is premature. Such a proceeding is not unusual; frequently the Court is forced to pass on the merits of a case in order to determine whether or not it has jurisdiction. Compare *Philadelphia Company v. Stimson*, 223 U. S. 605; *Ickes v. Fox*, 300 U. S. 82.

Coming, then, to the question of which sentence is valid, we believe that it is the ten-year sentence imposed upon the first count.⁵⁵ The offense being, as the Government admits, a single one, petitioner was twice placed in jeopardy when the court, after accepting his plea of guilty to Count One and imposing sentence, ordered the second count read, and sentenced him to an additional term of fifteen years.⁵⁶ That additional fifteen-year sentence was thus void under the Fifth Amendment. *Ex parte Lange*, 18 Wall. 163; *Hans Neilsen, Petitioner*, 131 U. S. 176.

It cannot be objected that the amount of time which elapsed between the successive placings of petitioner in jeopardy is so small as to be immaterial, so that the pleas which are in fact successive may be taken as simultaneous. Issues of time may often have to be very nicely calculated in determining double jeopardy. Cf. *McCarthy v. Zerbst*,

⁵⁴ Whether it would be proper to delay the petitioner's discharge until the sentence could be corrected (*Medley, Petitioner*, 134 U. S. 160, 174; *In re Bonner*, 151 U. S. 242, 261-262) does not bear on the prematurity of the application.

⁵⁵ The petition for certiorari makes the argument that both sentences are invalid. We respectfully submit that contention to the attention of the Court.

⁵⁶ The chronology is clear from the minutes of the arraignment, plea and motion (R. 8), and it is set out in some detail at R. 50-51.

85 F. (2d) 640 (C. C. A. 10th), certiorari denied 299 U. S. 610; *Clawans v. Rives*, 104 F. (2d) 240 (App. D. C.); *McFadden v. Commonwealth*, 23 Pa. 12; *State v. Savan*, 148 Ore. 423. There is no reason why the same precision should not be exercised here.

The decisions which hold that the two offenses merge, and that consequently only the greater offense is left for valid sentence, are quite distinguishable. In those cases the defendants stood trial, and the conviction on each count was necessarily simultaneous. *Durett v. United States*, 107 F. (2d) 438 (C. C. A. 5th); *Hewitt v. United States*, 110 F. (2d) 1 (C. C. A. 8th), certiorari denied 310 U. S. 641; see *Garrison v. Reeves*, 116 F. (2d) 978 (C. C. A. 8th). This is clearly pointed out in *Kokenes v. State*, 213 Ind. 476. We submit that here the only valid sentence is the ten-year sentence imposed in the first count.

It is thus essential to determine at this time under which sentence respondent is now holding petitioner. If the Court determines that the second or longer sentence alone is valid, petitioner is entitled to be discharged (even though such discharge may be delayed to correct the commitment). If, as we contend, the first sentence is valid, then we agree the petition is premature, but such decision will, of course, allow petitioner immediately to apply for parole.⁵⁷

Conclusion.

We respectfully submit that the decision below should be reversed, with instructions to issue a writ of *habeas corpus* and accord petitioner a full and fair hearing, and in any event, that the Court should declare that with respect to the excessive sentences that petitioner's application for relief is premature only because the valid sentence is the ten-year sentence imposed on the first count.

Respectfully submitted,

CHARLES A. HORSKY,
Counsel for Petitioner.

⁵⁷ U. S. C., Title 18, Sec. 714.

APPENDIX.

The Fifth Amendment to the United States Constitution provides in part:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

R. S. Sec. 751 (U. S. C. Title 28 Sec. 451) provides:

"The Supreme Court and the district courts shall have power to issue writs of habeas corpus."

R. S. Sec. 754 (U. S. C. Title 28 Sec. 454) provides:

"Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

R. S. Sec. 755 (U. S. C. Title 28 Sec. 455) provides:

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

R. S. Sec. 756 (U. S. C. Title 28 Sec. 456) provides:

"Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days."

R. S. Sec. 757 (U. S. C. Title 28 Sec. 457) provides:

"The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party."

R. S. Sec. 758 (U. S. C. Title 28 Sec. 458) provides:

"The person making the return shall at the same time bring the body of the party before the judge who granted the writ."

R. S. Sec. 759 (U. S. C. Title 28 Sec. 459) provides:

"When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time."

R. S. Sec. 760 (U. S. C. Title 28 Sec. 460) provides:

"The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained."

R. S. Sec. 761 (U. S. C. Title 28 Sec. 461) provides:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

U. S. C. Title 28 Sec. 832 provides:

"Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal. In any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General."

The Federal Rules of Civil Procedure provide:

"Rule 53. Masters.

"(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his

report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

“(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

“(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

“(d) Proceedings.

“(1) *Meetings*. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their

attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

"(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

"(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

"(e) Report.

"(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

"(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

"(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

"(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

"(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions."

Rule 81(a)(2) provides:

"In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States."

Judicial Code, section 262 (U. S. C. Title 28 Sec. 377) provides:

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court,

the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

U. S. C. Title 12 Sec. 588b provided in October, 1936:

"(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than \$1,000 nor more than \$10,000 or imprisoned not less than five years nor more than twenty-five years, or both."

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 14, ORIGINAL

FORREST HOLIDAY, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES
PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Circuit Court of Appeals denied the petitioner's application for leave to appeal in *forma pauperis* without opinion (R. 76). The order of the District Court approving the report of the United States Commissioner and denying without opinion the application for a writ of habeas corpus appears at R. 66. The District Court's order denying the motion for leave to appeal in *forma pauperis* to the Circuit Court of Appeals and certifying that there is no merit in the application for appeal appears at R. 68-69.

JURISDICTION

The order of the Circuit Court of Appeals denying the petitioner's application for leave to appeal in *forma pauperis* was entered September 5, 1940 (R. 76). The application for leave to file a petition for certiorari and to proceed in *forma pauperis* was received October 21, 1940. The application and the petition for certiorari were both granted March 3, 1941. Although the petition invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, it seems clear that jurisdiction must be invoked under Section 262 of the Judicial Code (U. S. C., Title 28, Sec. 377). See *In re 620 Church Street Corporation*, 299 U. S. 24, 26.

QUESTIONS PRESENTED

1. Whether the application for a writ of *habeas corpus* was premature in so far as it attacked the cumulative sentences imposed upon the two counts of the indictment, neither sentence having been served.
2. Whether an application alleging that the petitioner, who pleaded guilty to an indictment charging armed bank robbery, did not know and was not informed of his right to the assistance of counsel and was not represented by counsel states a *prima facie* case of detention in violation of the Sixth

Amendment and calls for the issuance of a writ of *habeas corpus*.

3. Whether the petitioner's testimony before the United States Commissioner is to be regarded as an elaboration of his application and, if so, whether the testimony sufficed to state a case of coercion or deception.

4. If the rule to show cause developed a material issue of fact, whether the District Court erred in issuing a writ of *habeas corpus* returnable before a United States Commissioner, the function and effect of the procedure being to refer the issues to the Commissioner to hear the testimony and find the facts.

5. Whether, in other respects, the procedure infringed the petitioner's substantial rights.

**CONSTITUTIONAL PROVISIONS, STATUTES AND RULES
INVOLVED**

The relevant provisions of the Constitution, statutes and rules are set forth in the Appendix.

STATEMENT

On May 8, 1939, petitioner filed in the United States District Court for the Northern District of California, Southern Division, a petition for a writ of *habeas corpus*, alleging that he is unlawfully imprisoned in the United States Penitentiary at Alcatraz, in the custody of the respondent (R. 1-3).

The amended petition, signed by petitioner's attorney (R. 3) and accompanying exhibits (R. 3-9)

showed that petitioner was indicted on September 24, 1936, in the United States District Court for the District of North Dakota, Northeastern Division. The indictment, based on U. S. C., Title 12, Section 588 b (R. 3-5) charged, in the first count, that on May 27, 1936 the defendant (named as James Thomas) and two accomplices robbed the Farmers State Bank of Maddock, North Dakota, an insured bank; and, in the second count, that in the course of the robbery they put in jeopardy the lives of the officers of the bank with an automatic pistol. Petitioner pleaded guilty to both counts on October 13, 1936 (R. 1, 5) and was sentenced to ten years' imprisonment upon the first count and fifteen years upon the second, the sentences to run consecutively (R. 1, 8-9). The record recites, with respect to each sentence, that the defendant was asked "to show cause, if any he have, why sentence should not now be pronounced against him" and that no cause was shown (R. 8).

The petition alleged that the judgment and sentence were unlawful for the reason that petitioner did not "have the advice and assistance of counsel", "the trial court did not advise or inform him that he was entitled to counsel", he "did not know that he was entitled to or could have the advice or assistance of counsel in the absence of his ability to pay for the same" and "because of the above premises" he "was not able to and did not make an intelligent or competent waiver of his constitutional

right". The petition also alleged that the two counts of the indictment charged but one offense, with the result that he was placed in double jeopardy by the consecutive sentences (R. 2).

Upon the filing of the petition, the District Court issued an order directing the respondent to show cause why a writ of habeas corpus should not issue (R. 9). The respondent filed a return to the order, praying that the petition for a writ of habeas corpus be dismissed and incorporated, in addition to the indictment, judgment, sentence, commitment, docket entries (R. 11-12) and transfer order (R. 12-15), the certificate of Andrew Miller, Judge of the District Court for the District of North Dakota (R. 15) and the affidavit of Angus Kennedy, Deputy Marshal for the same district (R. 15-16).

The certificate of Judge Miller set forth that he had been a District Court Judge for seventeen years; that it had always been his "uniform practice to inquire of defendants appearing before" him, without counsel and charged with the commission of felonies, "whether or not they desired counsel, and if so to offer to appoint counsel"; that he had no independent recollection of the petitioner's case, but that in view of his "long established practice in such cases and the fact that" he imposed a long prison sentence, he was "positive to a moral certainty" that he did ask the petitioner "whether or not he desired to be

represented by counsel before" permitting the plea of guilty to be entered.

The affidavit of Angus Kennedy set forth that he is a Deputy Marshal for the District of North Dakota; that he and the United States Marshal transported petitioner on October 22, 1936, from Fargo, North Dakota, to McNeil Island, Washington, under a commitment of the United States Court for the District of North Dakota (R. 15); that during the course of this trip, the petitioner expressed the view that he had not been accorded "fair treatment by the government agent who investigated his case and to whom he had admitted his guilt" (R. 16) because the agent had promised him he would receive a sentence not to exceed 25 years, when in fact he did not receive a straight 25-year sentence, but a sentence of 10 years on the first count of the indictment and 15 years on the second; that this meant he would have to serve a full 10-year sentence and the required portion of the 15-year sentence before he would be eligible for parole; that the affiant asked the petitioner why he did not have an attorney and the petitioner answered that he had no use for an attorney; that he would have been satisfied had he received the sentence promised, and that he did not go to trial because he feared certain facts might transpire that would not be for his best interest; that the petitioner said "I knew I would get the book thrown at me" (R. 16).

The petitioner filed a traverse (R. 16-18) dated July 31, 1939, denying that Judge Miller asked him whether or not he wished to be represented by counsel, that he had told Kennedy that he had no use for an attorney, that he would have been satisfied had he received the straight 25 year sentence and that he did not go to trial because he feared "the book would be thrown" at him (R. 18).

On December 14, 1939, the District Court issued a writ commanding the respondent to have the body of the petitioner before the United States Commissioner for the Northern District of California, Southern Division, at the Administration Building of the United States Penitentiary at Alcatraz, on December 16 (R. 18).

The Commissioner held a hearing on December 19, at which petitioner appeared with his counsel and gave the following testimony:

He was arrested in Excelsior Springs, Missouri, on September 21, 1936 by two agents of the Federal Bureau of Investigation, who took him to Kansas City (R. 37-38, 43). In Kansas City he was held in the county jail and removal proceedings were instituted against him (R. 38). He retained counsel, to whom he paid a fee of \$100 (R. 44-46, 52-55). His attorney was with him on two of the three occasions on which he appeared before the United States Commissioner in the removal proceedings (R. 46). The charges in the indictment were read to him before the Commis-

sioner (R. 55) and he understood that the charge was bank robbery (R. 48). When petitioner's attorney learned of the indictment, he said that he could be of no assistance (R. 44, 55), that he "might as well go to North Dakota" (R. 54). After his attorney had given him this advice (R. 44, 62), two Department of Justice agents, who had appeared on several occasions (R. 38), told him that unless he consented to removal and signed a statement they would give him "approximately 80 years" and, if he had any witnesses, would see that "they got ten years" (R. 38). The agents "marked down 25, 25, 10 and 10 and 10 on a piece of paper" (R. 61). They did not say what the charges were (R. 61-62) but explained that "all these 10 years were to be for the various state lines" he crossed (R. 63). The agents also said that if he would sign the waiver and the statement they would recommend that he get only ten years (R. 38, 63). Under these threats and on this representation, he signed a consent to removal (R. 44, 62, 36, Resp. Ex. 1, R. 32-33) and a statement that "he was implicated in the robbery of the Maddock Farmers State Bank May 26th, 1936" (R. 48, 36, Resp. Ex. 8, R. 33). The waiver recited that he executed it of his "own free will, and without any pressure, compulsion or coercion of any kind whatsoever"; the statement recited that it was made "of my own free will with no threats or promises being made me" (R. 33).

Petitioner testified that he did not discuss the waiver and statement with his attorney (R. 47). He does not now know whether he actually thought he would be sentenced to a term of 80 years (R. 62). From previous experience he knew that he would have to be convicted before he was sentenced and that the charges against him would have to be proved. But he did not know "what charges they could put against" him or "how much time" he "could get" (R. 63). He did know that the indictment charged robbery (R. 48). The discussion with the agents did not relate to what plea he should enter but to the statement he should sign for them (R. 64, 45; but cf. R. 61). The agents involved were those whose names are attached to the waiver (R. 39, 45).

Petitioner's discussion with his attorney related only to extradition. They did not speak of the robbery, of petitioner's guilt or innocence, of the substance of the indictment or of the course he should follow when he arrived in North Dakota (R. 52-55). He did tell the attorney that he was in Minnesota at the time of the robbery charged but when the attorney asked for the names of witnesses to prove this, petitioner gave him none (R. 53-54). Though he was held in a ward with other federal prisoners in Kansas City, he did not discuss his case or their cases with any of them (R. 46).

After consenting to removal, he was taken to Fargo by a United States Marshal and a Deputy

o Marshal (R. 39). In Fargo he was confined alone, had no visitors and was not interviewed by representatives of the Government. (R. 39, 47.) He had approximately \$20 on his person (R. 40, 52) but did not consult an attorney or make any effort to do so (R. 39, 41). About four days after his arrival he was brought into court (R. 39). Three or four prisoners were sentenced before his case was called (R. 48). The indictment was not read to him by the clerk (R. 40) but both counts were read to him by the United States attorney or his assistant (R. 50) and the judge explained that he was charged with robbing a bank in North Dakota (R. 49). He knew the nature of the charges and pleaded guilty to both counts (R. 50). When the second count was read, petitioner hesitated and the judge "instructed that anyone who was guilty of any part of it, was guilty of all" (R. 51). Then he pleaded guilty to the second count. The judge asked if he had anything to say before being sentenced. He replied "nothing" (R. 51). An F. B. I. agent, whom he had never seen, made a statement to the court about his criminal record but did not recommend leniency (R. 47, 64).

Petitioner testified, further, that neither the judge nor the United States attorney asked him whether he desired to be represented by counsel or advised him of his right to counsel (R. 40). He did not know that he had a right to have counsel unless he could pay a fee, and he had only \$20, not enough to retain a lawyer (R. 40-41). He had been ar-

rested six or eight times before (R. 58), had appeared in court twenty years ago in Oklahoma (R. 43) on a vagrancy charge (R. 57-58), was convicted of larceny in Wisconsin in 1926 (R. 42, 58), after being extradited from North Dakota (R. 42, 58). On the latter charge he was represented by counsel both in the extradition proceeding and at the trial (R. 42, 58). He received a sentence of one to ten years, served six months in the state penitentiary and three years in the reformatory (R. 59). During none of these earlier experiences was he advised or did he learn of a right to counsel without payment of a fee (R. 43). He had read of public defenders being appointed in murder trials but he thought, before going to Alcatraz, that it was only in that case that counsel could be appointed without funds. He first learned of defenders in other cases when in Alcatraz he read the decision in *Johnson v. Zerbst* (R. 59). His formal education was one year in high school. But he had done considerable reading on scientific subjects and in all types of fiction, including the classics and Shakespeare (R. 57). And while he was in the Wisconsin Reformatory, he took an extension course from Wisconsin University in automobile mechanics (R. 59-60). At the time of the hearing before the Commissioner he was nearly 37 years old (R. 63).

After his sentence in Fargo, he was taken to McNeil Island, Washington by Deputy Marshal Kennedy (R. 41). He did not converse with Ken-

nedy *en route* about his failure to have an attorney represent him (R. 41) or to stand trial (R. 42). Their only conversation occurred upon leaving the court room when Kennedy asked him if he did not know of the second count until it was read. He replied that that was the first time he had heard of it (R. 60). He never told Kennedy that the Government agents had promised him a sentence of not more than twenty-five years, that he would have been satisfied had he received the sentence promised him (rather than cumulative sentences of ten and fifteen years), that he had no use for an attorney or that he did not stand trial because he feared that he would "get the book thrown at" him (R. 61).

The Commissioner asked him whether he recalled what the first count of the indictment was. He replied "I was charged in the words of the statute 'taking by force, fear and violence a certain sum of money'" (R. 63). To a similar inquiry with respect to the second count, he replied: "the second count, as I recall, from the indictment, was that in committing the first offense I put in jeopardy, the lives of the bank officials" (R. 63).

Upon the conclusion of the petitioner's testimony, the hearing was adjourned. At a second hearing before the Commissioner on April 30, 1940 (R. 33), the depositions of the United States Attorney for the District of North Dakota (R.

19-22) and the Deputy Marshal (R. 22-24), taken pursuant to notice mailed January 24 (R. 25) were received in evidence (R. 34).

[United States Attorney Lanier deposed that he first made the acquaintance of petitioner on October 13, 1936, when he was brought into the federal courtroom at Fargo, North Dakota, for arraignment (R. 20). He had no independent recollection of what he or the judge said to the petitioner when he was arraigned. But it was and is the invariable rule in his office for the United States Attorney or an assistant to advise a defendant, appearing without counsel, of the charges against him. He would then be advised by the court of his constitutional right. The court would advise him of his right to have an attorney, and if he had none, would ask him if he wanted an attorney. If he wanted an attorney, he would be asked if he had the money with which to pay him and if he said he did not have, the court would advise him that an attorney would be appointed for him and this would be done (R. 21). - To his knowledge Judge Miller had never failed to advise a defendant of his constitutional rights and to ask if he desired counsel. He was certain that the petitioner was advised of the charges against him and morally sure that Judge Miller followed the usual practice in this case (R. 22).

Deputy Marshal Kennedy deposed (R. 22-24) that he transported the petitioner from the county

jail to court and back and, subsequently, to McNeil Island. Coming out of the courtroom, after sentence, petitioner said "Take me out and shoot me". On the way to McNeil Island, petitioner claimed that he had "made a deal with the F. B. I. men that he would plead guilty and take a twenty-five year sentence but that he did not figure that he was going to get two sentences, ten and fifteen years. Asked why he did not get an attorney to fight the case his answer was "something to the effect that he couldn't afford to go to Court, that if he did they would hang him". At no time during the course of the trip did he indicate that he desired an attorney (R. 24).

The Commissioner also received in evidence the statement signed by the petitioner that he was "implicated in the robbery" and his consent to removal from Kansas City (R. 36).

On May 23, 1940, the Commissioner filed his report (R. 26-32) in which, after summarizing the petitioner's testimony, the certificate of Judge Miller, the depositions of A. G. Kennedy and P. W. Lanier, and Kennedy's affidavit, he made the following findings of fact (R. 30):

- (1) Petitioner's criminal experience enabled him to understand and appreciate his rights;
- (2) Petitioner voluntarily entered a plea of guilty after thoroughly understanding the charges involved;
- (3) It was the uniform practice of the court in which sentence was imposed to in-

quire of those charged with felonies whether or not they wished counsel;

(4) The court in which sentence was imposed advised petitioner of his constitutional right to be represented by counsel;

(5) Petitioner voluntarily signed an admission of guilt;

(6) Petitioner competently and intelligently waived his right to the assistance of counsel.

The Commissioner concluded that the petitioner's attack upon the validity of the sentence was premature because he had not served the sentence on the first count; and that "the experience petitioner achieved in criminal proceedings, his voluntary pleas of guilty to both counts; the uniform practice of the Court to advise those accused of felonies of their constitutional right to be represented by counsel—a practice which your Commissioner finds was followed in the instant matter, lead to the conclusion that petitioner competently and intelligently waived his right to the benefit of counsel" (R. 31-32). Accordingly, he recommended that the petitioner's application be denied.

On July 1, 1940, the District Court entered an order accepting the report of the Commissioner, denying the application for a writ of habeas corpus and discharging the writ (R. 66).¹ On August 1,

¹ On June 20, 1940, petitioner filed in the Circuit Court of Appeals for the Ninth Circuit a petition for a writ of mandamus, directing the District Court to rule on his applica-

1940, the petitioner filed in the District Court a motion for leave to appeal in forma pauperis (R. 66-67). The court reviewed the proceedings, certified that there was no merit in the application for appeal and denied the application (R. 68-69). On September 5 a similar petition was denied, without opinion, by the Circuit Court of Appeals for the Ninth Circuit (R. 73-75).

SUMMARY OF ARGUMENT

I

The application for a writ of habeas corpus was premature in so far as it attacked the successive sentences imposed upon the two counts of the indictment. Conceding that subsection (b) of U. S. C. Title 12, Sec. 588 b defines an aggravated form of the crime defined by subsection (a), and that the statute does not authorize sentences upon both subsections for the same robbery, it is equally true that the statute sanctioned either sentence and that neither has thus far been served. There is no occasion in this proceeding to determine which of the sentences is valid. Whichever is valid, the petitioner is not entitled to immediate release and the petition for a writ of habeas corpus is therefore premature. *McNally v. Hill*, 293 U. S. 131 definitively holds that habeas corpus is not the

tion for a writ of habeas corpus (R. 69-72). Before the Circuit Court acted on this petition, the order of the District Court was entered.

remedy to fix the date of petitioner's eligibility for parole. If the issue were material at this stage, we should not hesitate to urge that the valid sentence is the longer one imposed upon the second count.

II

The second ground alleged in the application, that petitioner when he pleaded guilty did not know and was not informed of his right to have counsel assigned, is insufficient to attack the judgment under the Fifth and Sixth Amendments. The circumstances alleged establish neither a denial of the right to counsel nor the type of injury which we believe to be essential to render a judgment of conviction subject to collateral attack on habeas corpus.

Neither the Fifth nor the Sixth Amendment is violated by the failure of the trial court to assign counsel to represent a petitioner who pleads guilty, unless he requests the advice of counsel or is in need of counsel's aid. Neither *Johnson v. Zerbst*, 304 U. S. 458, nor *Walker v. Johnston*, No. 173, present Term, conflicts with this contention as to the scope of the constitutional guarantee. Both a request and a need for counsel were shown by the evidence in the *Zerbst* case and the pleadings in the *Walker* case, as they were construed by this Court. The broad statements in the opinion in the *Zerbst* case must be read in the light of the disposition of that case by this Court, which indi-

cates that the right is subject to qualifications which were not fully defined or, what is in substance the same thing, that a waiver may be found even though there is not an intentional relinquishment of a known right. In arguing that the Constitution does not require an offer to assign counsel to an indigent defendant in the absence of request or need, we accord to the Sixth Amendment at least as much scope as its history supports. Even less has been thought to suffice.

The distinction between a trial and a plea of guilty as evidence of need for counsel is the implicit basis of the many decisions since *Johnson v. Zerbst* which treat a voluntary plea of guilty, made, without requesting counsel, as a waiver of the right. A trial judge does not accept a plea of guilty without assuring himself that it is voluntary and competent and if it is not, we concede that it can be set aside (*Frame v. Hudspeth*, 309 U. S. 632).

The same conclusion follows from considerations as to the proper scope of the remedy of habeas corpus. To attack a judgment collaterally because of the denial of a constitutional right we contend that the petitioner must show that he was prejudiced by the act alleged to constitute the denial. To make such a showing he must establish that he suffered from the lack of counsel either in choosing his own course or in presenting his case. If the denial of counsel is ever truly jurisdictional,

we contend that it is only jurisdictional when it results in substantial injury. The recognized distinction between a trial which is unfair and one which is void indicates that the concept of jurisdictional defect is not impervious to differences of degree.

Petitioner's case is not significantly strengthened even if, as he contends, his testimony before the United States Commissioner should be treated as an elaboration of his petition and traverse. His assertion at the hearing that two Government agents threatened him with a long sentence, if he refused to consent to removal and to sign a statement acknowledging his guilt, does not make out a claim that he was deceived or coerced when he subsequently pleaded guilty. On his own statement, the discussion with the agents did not relate to the plea he should subsequently enter. Moreover at the time of the alleged statements petitioner was represented by counsel who had advised him to consent to removal. He was thus in a position to protect himself by obtaining the requisite legal advice at the time of the incident complained of.

III

Assuming that the rule to show cause developed material issues of fact, petitioner was deprived of no substantial right by the procedure employed to resolve them.

1. The action of the court in issuing a writ of habeas corpus returnable before a United States Commissioner was plainly equivalent to a reference of the issues developed on the rule to show cause, with direction to the Commissioner to take the testimony and report to the District Court with findings of fact and conclusions of law. The function and effect of the procedure was so conceived by the Commissioner, the court, the petitioner, and the petitioner's counsel. This mutual understanding is in keeping with the practice of the Federal courts for California for more than half a century.

2. A reference is permissible in habeas corpus proceedings. The only substantial question is whether it is incompatible with the statutory command that the court "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments". In view of the established practice of courts both at law and in equity, the practice of this Court, the broad definition of the power to appoint a master contained in Rule 53 of the Rules of Civil Procedure, we argue that a court none the less hears and determines because it refers the issue in the first instance to an inferior officer to take and report the testimony with his findings of fact.

If a reference is not incompatible with the hearing prescribed by the habeas corpus statute, we think it clear that the power to refer exists as an

aspect of the inherent power of Federal courts, broadly articulated in Rule 53 (a) of the Rules of Civil Procedure. The objection that the reference was forbidden by Rule 53 (b) because of the absence of exceptional circumstances plainly comes too late and would not have been valid if timely made.

3. The procedure did not otherwise deprive the petitioner of any substantial right.

(a) It was not improper to hold the hearing before the Commissioner in the Administration Building of the Penitentiary at Alcatraz.

(b) It was unnecessary for the court to make its own findings of fact since it adopted the findings of the Commissioner (Rule 52 (a), Rules of Civil Procedure).

(c) The finding that the petitioner was informed of his right to counsel is not invalid, even if, as petitioner contends, the Commissioner erroneously considered the certificate of the trial judge. In view of the deposition of the United States Attorney, the certificate was cumulative at the most. It is not clear that the court in approving the finding considered the certificate and, in view of the other evidence, there is no significant probability that its consideration affected the result. Moreover the finding that petitioner was informed of his right to counsel is unnecessary to support the judgment.

(d) The record does not support the argument that the procedure in the District Court operated

to deny the petitioner an opportunity to be heard on the approval of the Commissioner's report.

ARGUMENT

The petitioner asks that this Court exercise its power to determine the merits of the issues presented rather than the narrower question whether the Circuit Court of Appeals abused its discretion in denying the application to that court for leave to appeal *in forma pauperis*. (Cf. *In re 620 Church Street Corporation*, 299 U. S. 24, 27). We join in this request.² It is almost two years since the application for a writ of habeas corpus was filed in the District Court and the petitioner is still in custody. The issues involved have an importance to the administration of justice which would call for review on certiorari had they been determined by the Circuit Court of Appeals (cf. *Liberty Oil Co. v. Condon National Bank*, 260 U. S. 235, 245), perhaps even before judgment in that court, if the case were pending there. Moreover, the merits of the petitioner's contentions must be examined, in any event, to determine whether discretion was abused. We think that these considerations jus-

² We agree with the petitioner that the District Court's certification that "there is no merit in the application for appeal" is not to be read as a certificate that the appeal "is not taken in good faith" under the Act of June 25, 1910, c. 435, (36 Stat. 866), U. S. C., Title 28, Section 832; and that the District Court purported to exercise its own discretion to deny an appeal *in forma pauperis* without precluding an application to a higher court (See the Brief in Opposition in *Bell v. Johnston*, No. 438, present term).

tify a final determination of the merits at this stage (cf. *Bowen v. Johnston*, 306 U. S. 19).²

On the merits, we argue that the petition for a writ of habeas corpus and the traverse to the respondent's return state no case for the issuance of the writ; that if the pleadings on the rule to show cause developed a material issue of fact, it was not error to issue a writ returnable before a United States Commissioner, the function and effect of the procedure being to refer the issues to the Commissioner to hear the testimony and find the facts; that the procedure did not otherwise deprive the petitioner of substantial rights and that the writ was correctly discharged.

I

THE PETITION AND TRAVERSE STATED NO CASE FOR THE ISSUANCE OF THE WRIT OF HABEAS CORPUS

The petition for a writ of habeas corpus (R. 1-3) attacked the legality of the petitioner's detention on two grounds: (1) that the cumulative sentences imposed on the two counts of the indict-

² If the narrower issue were alone to be determined, it would, however, be relevant that the substantial questions raised by the petitioner in this Court were certainly not set forth explicitly in the petitions for leave to appeal in forma pauperis addressed to the District Court (R. 66-67) and to the Circuit Court of Appeals (R. 73-74). The assignment that the "Court erred in not issuing a writ of habeas corpus" is hardly an informative statement of the point made here that what purported to be a writ was a legal nullity and that a reference is impossible in a habeas corpus proceeding.

ment constituted double jeopardy; and (2) that the judgment and sentence were in conflict with the Sixth Amendment because the right to counsel was denied. The traverse (R. 16-18) denies various allegations in the Warden's return to the rule to show cause but alleges no new facts and makes no additional contentions. We contend that the petition was premature on the first ground of attack; and that, on the second, the facts alleged are legally insufficient to entitle the petitioner to relief. If our contentions are valid, there was no occasion to issue a writ of habeas corpus (*Walker v. Johnston*, No. 173, present Term) and the application for a writ was properly dismissed.⁴

1. THE APPLICATION WAS PREMATURE INsofar AS IT ATTACKED
THE SUCCESSIVE SENTENCES IMPOSED UPON THE TWO COUNTS
OF THE INDICTMENT

Both counts of the indictment were based upon the Act of May 18, 1934, c. 304, Sec. 2 (48 Stat. 783),

⁴ It is immaterial in this connection that the District Court issued a writ returnable before the United States Commissioner and dismissed the petition on the basis of the facts found rather than the sufficiency of the pleadings. The judgment was correct if the petitioner's allegations did not make out a *prima facie* case. See *United States v. Sing Tuck*, 194 U. S. 161, 170; *United States v. Ju Toy*, 198 U. S. 253, 261; *Ex parte Hull*, No. —, Original, decided March 3, 1941. We argue below (pp. 45-50) that the conclusion is the same if the petitioner's testimony before the United States Commissioner is to be regarded for this purpose as an elaboration of his written application (cf. *Whitten v. Tomlinson*, 160 U. S. 231, 242, 244).

U. S. C., Title 12, Sec. 588b. The first count, under subsection (a) of the statute charged robbery of an insured bank and the second count, under subsection (b) charged that lives were put in jeopardy in the course of the robbery, by the use of a dangerous weapon. Petitioner was sentenced to imprisonment for ten years on the first count and for fifteen years on the second, the latter sentence to commence at the expiration of the former (R. 9).

The petition for a writ of *habeas corpus* contends that the two counts alleged a single offence and that the cumulative sentences constituted double jeopardy. We think it clear that Congress could constitutionally punish putting lives in jeopardy in the course of a robbery as a separate crime, distinct from the robbery itself (*Albrecht v. United States*, 273 U. S. 1, 11; *Carter v. McClaughry*, 183 U. S. 365, 394-395). As a matter of statutory construction however, we agree that Congress did not intend to do so; that subsection (b) of the statute defines an aggravated form of the crime defined by subsection (a); and that the sentence of five to twenty-five years authorized by subsection (b) is an alternative rather than an addition to that of not more than twenty years authorized by subsection (a). *Durrett v. United States*, 107 F. (2d) 438 (C. C. A. 5th); *Hewitt v. United States*, 110 F. (2d) 1 (C. C. A. 8th); H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2.

That the successive sentences were unauthorized does not, however, entitle the petitioner to relief on *habeas corpus*. If the statute did not sanction both sentences, it certainly sanctioned either and neither has thus far been served.⁵ We see no occasion in this proceeding to determine whether, as petitioner contends, the valid sentence is that on the first rather than that on the second count. Whichever is valid, the petitioner is not entitled to immediate release and the petition for a writ of *habeas corpus* is premature. (*McNally v. Hill*, 293 U. S. 131; *De Bara v. United States*, 99 Fed. 942 (C. C. A. 6th); see also *United States v. Pridgeon*, 153 U. S. 48, 62-63). Petitioner argues that this Court should determine which sentence is invalid to fix the date of his eligibility for parole. *McNally v. Hill*, *supra*, definitively holds that for this purpose *habeas corpus* is not the remedy.

If the issue were material at this stage, we should not hesitate to urge that the valid sentence is the longer one imposed upon the second count (cf. *Hewitt v. United States*, *supra*). While that sentence was to commence at the expiration of the first, we see no reason why it should not be taken to have begun at the start, if the first was invalid. (cf. *Kite v. Commonwealth*, 11 Metcalf 581, 585 quoted in *Blitz v. United States*, 153 U. S. 308,

⁵ The ten-year sentence, less the statutory good time allowance (U. S. C., Title 18, Sec. 710) would not expire until June 30, 1943.

318; *McNealy v. Johnston*, 100 F. (2d) 280 (C. C. A. 9th); *Ex parte Peters*, 19 Fed. Cas. 359 (W. D. Mo.). It is true that upon direct appeal from the judgment, the sentence would be amended to fix a definite date of beginning (*Fleisher v. United States*, 302 U. S. 218, 220, *Blitz v. United States*, *supra*). It does not follow that the amendment is necessary (cf. *DeBara v. United States*, *supra*; *McNealy v. Johnston*, *supra*; *Ex parte Peters*, *supra*; *United States v. Carpenter*, 151 Fed. 214 (C. C. A. 9th) or, even if it is, that the petitioner's remedy is habeas corpus rather than a motion to correct the sentence. The formal amendment can be made by the sentencing court at any time,* and if the amendment is refused, mandamus is available to compel it (*Garrison v. Reeves*, 116 F. (2d) 978 (C. C. A. 8th); see *McNally v. Hill*, *supra*). Moreover, even if the writ were to be sustained on this ground, it would be proper to delay the petitioner's discharge to permit the difficulty to be resolved by correction of the sentence (*Medley, Petitioner*, 134 U. S. 160, 174; *In re Bonner, Petitioner*, 151 U. S. 242, 261-262; *United States v. Carpenter*, 151 Fed. 214, 216 (C. C. A. 9th).

* See *In re Bonner, Petitioner*, 151 U. S. 242, 260; *Williams v. United States*, 168 U. S. 382, 389; *Bryant v. United States*, 214 Fed. 51, 53-54 (C. C. A. 8th); *Copeland v. Archer*, 50 F. (2d) 838, 838 (C. C. A. 9th); *DeBenque v. United States*, 85 F. (2d) 202, 207 (App. D. C.), certiorari denied, 298 U. S. 681; *Garrison v. Reeves*, 116 F. (2d) 978 (C. C. A. 8th).

2. THE APPLICATION WAS LEGALLY INSUFFICIENT TO ATTACK
THE JUDGMENT UNDER THE FIFTH AND SIXTH AMENDMENTS

The application alleged no more than that petitioner, a man of mature age who had previously been convicted of a crime (R. 14A), pleaded guilty to both counts of the indictment, that he was not represented by counsel, that he did not know and was not told of his right to have counsel assigned, and that he could not, therefore, have made an intelligent or competent waiver of his constitutional right. It is not alleged that he desired or requested counsel, that he pleaded guilty under any misapprehension as to the nature of the charge or the implications of the plea, that he was induced to enter the plea by deception or coercion, that he is innocent of the crime charged, or that he would now interpose a defense. It is not even alleged that he was without funds to employ counsel at the time of his plea. The substance of the charge is only that he did not know and was not told of his right to have counsel assigned.

We contend that on these allegations, the application is legally insufficient to attack the validity of the judgment. In our view, the circumstances alleged establish neither a denial of the right to counsel guaranteed by the Sixth Amendment nor the type of injury which we believe to be essential to render a judgment of conviction subject to collateral attack on habeas corpus.

A. The Scope of the Right to Counsel

First: In *Walker v. Johnston*, No. 173, present Term, the Government contended that neither the Fifth nor the Sixth Amendment imposes upon trial courts the duty to assign counsel to a defendant charged with crime, unless he requests assistance or is in need of aid. This Court held that the application for habeas corpus stated a case sufficient to "overcome the presumption of regularity which the record of the trial imports". The decision rested upon the ground that

"if the facts alleged were established by testimony to the satisfaction of the judge, they would support a conclusion that petitioner desired the aid of counsel and so informed the District Attorney, was ignorant of the right to such aid, was not interrogated as to his desire or informed of his right, and did not knowingly waive that right, and that, by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course."

The multiple bases of the decision indicate, we think, that the Court rejected our interpretation of the pleadings rather than our contention as to the general scope of the right. Similarly, in *Smith v. O'Grady*, No. 364, present Term, decided February 17, 1941, the petition alleged entrapment and

deception in inducing the petitioner to plead guilty as well as vain efforts on his part to obtain the assistance of counsel and to withdraw his guilty plea. These were the allegations which were held sufficient to attack the judgment of a state court under the Fourteenth Amendment. We think it clear, therefore, that the decisions at the present term do not establish the sufficiency of the present application. On the contrary, the emphasis placed upon the allegations of request for counsel and of deception or coercion¹ imply that when such allegations are absent as they are here, the petition is insufficient to state a case.

Second: None of the earlier decisions of this Court supports the contention that an assignment of counsel is required by the Constitution in the absence of request or need.

In *Johnson v. Zerbst*, 304 U. S. 458, upon which petitioners rely, there was an unresolved issue on the evidence as to whether the defendants had not expressly requested and been refused counsel. Moreover, the defendants pleaded not guilty, there was a trial in which they were not represented by counsel, they attempted unsuccessfully to obtain counsel after conviction and sentence and they lost their right to appeal because their papers were

¹ The opinions in *Walker v. Johnston*, *supra*, and *Smith v. O'Grady*, *supra*, indicate that deception or coercion is an independent ground for invalidating a judgment of conviction (cf. *Mooney v. Holohan*, 294 U. S. 103), though the absence of counsel is undoubtedly a related factor which aggravates the injury to the defendant.

not filed in time.⁸ From the beginning of the case to the end the defendants denied their guilt; and when they appeared in court and expressed their determination to proceed, their need for counsel was as pressing and as clear as it could possibly have been. Even then this Court did not definitely hold that the right to counsel was denied. The decision, below declining to intervene on habeas corpus was reversed but the case was remanded to determine whether the right had been waived. There was no evidence that the petitioners had been informed of their right to have counsel assigned, that they knew of their right or that any offer had been made to obtain counsel for their assistance. Implicit in the determination, therefore, is the view that the right is subject to qualifications which were not fully described or, what is in substance the same thing, that a waiver may be implied in law even though there was not an "intentional relinquishment or abandonment of a known right" (304 U. S. at 464).

It is true that in the *Johnson* case the opinion contains the broad statements that the "Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel" (304 U. S.

⁸The evidence in the *Johnson* case is fully analyzed in the Government's brief in *Walker v. Johnston*, No. 173, present Term; pp. 25-28.

at 463); that "If the accused * * * is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty" (304 U. S. at 468); that the "constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel"; and, finally, that this "protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused" (304 U. S. at 465).

Taken literally, these statements undoubtedly would mean that the trial court is under a constitutional duty to offer to appoint counsel even though the accused makes no request for counsel and is not in need of aid. We think, however, that it is fair to suggest that they were written "under the pressure of" the particular situation (cf. *Snyder v. Massachusetts*, 291 U. S. 97, 114) and that they cannot be taken literally as the precise measure of the constitutional right. For if they are to be taken literally, it is difficult to understand why it is that this Court remanded the case to the District Court with directions to determine the issue of waiver rather than with directions to sustain the writ. This disposition of the case indicates, as we have said, that the right

is subject to qualifications which were not defined. We think the whole opinion makes clear that the decision rests upon the apparent and indisputable need for counsel when defendants, asserting their innocence, proceed without legal knowledge to try their own case, are convicted and forfeit their right to appeal.

Powell v. Alabama, 287 U. S. 45, upon which the petitioner also relies, certainly does not indicate that the Constitution requires the assignment of counsel in the absence of request or need. The tragic circumstances presented in that case need not be repeated in detail. It is enough to say that the defendants were charged with a capital crime; that they protested their innocence and were forced to immediate trial at a time when the degree of popular passion against them required reliance upon the military forces. This Court held, as one of the grounds of decision that "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was * * * a denial of due process within the meaning of the Fourteenth Amendment" (287 U. S. at 71). The ultimate basis of the decision was that in "a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel" (287 U. S. at 72) or, as this Court said in *Palko v. Connecticut*,

302 U. S. 319, 327, "that in the particular situation * * * the benefit of counsel was essential to the substance of a hearing." *Avery v. Alabama*, 308 U. S. 444, in which the judgment of the state court was affirmed, does not extend the principle or alter the basis upon which it rests.

We deny that the principle of these due process decisions may properly be applied to a defendant who makes no defense, does not seek to be heard and even now does not allege that he desires to make a defense; and that not even the Sixth Amendment requires an offer to appoint counsel where counsel was not requested and the need for counsel did not otherwise exist.

Third: In arguing that the Constitution does not require an offer to assign counsel to an indigent defendant, in the absence of request or need, we accord to the Sixth Amendment at least as much scope as its history supports.

Even less has been thought to suffice. After an extensive historical survey of the colonial practice and the early state constitutional provisions, this Court concluded in *Powell v. Alabama*, 287 U. S. 45, 68:

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired *and provided* by the party asserting the right. [Italics ours.]

See also *Cooke v. United States*, 267 U. S. 517, 537.

On at least one occasion this Court has explicitly said that there is "no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners (*United States v. Van Duzee*, 140 U. S. 169, 173). A similar view has been forcefully expressed by Judge Sibley, concurring in *Saylor v. Sanford*, 99 F. (2d) 605, 607 (C. C. A. 5th):

The Constitution in saying that "the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence" means that if he provides himself counsel the court shall allow the counsel to assist and represent the accused—a right not accorded the accused in felony cases by the common law. It has never been understood that the federal courts were bound by the Constitution to furnish accused persons with counsel. * * * There are proposals pending before Congress to provide for a public defender, and for paying lawyers to defend indigent persons in some cases. All these arrangements for the defense of poor persons are acts of mercy, perhaps justice, but they are not required by the constitutional provision and have never been supposed to be.

See also *Sanford v. Robbins*, 115 F. (2d) 435 (C. C. A. 5th), No. 613, present Term, certiorari denied, March 10, 1941.

This conclusion finds support in the Act of April 30, 1790 (1 Stat. 112, 118, c. 9, Sec. 29; R. S.

Sec. 1034; U. S. C., Title 18, Sec. 563); enacted after the first ten amendments had been proposed by Congress (1 Stat. 97) which provided that in prosecutions for treason and other capital crimes the court before which the accused "is tried" is required "immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire." It is unlikely that the duty to assign would have been thus limited if the Sixth Amendment contemplated its existence in all cases.

The conclusion is also supported by the decisions of state courts, under constitutional provisions similar to the Sixth Amendment,⁹ that the right to have counsel assigned is statutory rather than constitutional. See *e. g.* *People v. Williams*, 225 Mich. 133, 137-138; *Reed v. State*, 143 Miss. 686, 689; *State v. Sweeney*, 48 S. D. 248, 251; *Sowells v. State*, 99 Tex. Cr. App. 465, 468; *Pardee v. Salt Lake County*, 39 Utah 482, 488; *State v. Gomez*, 89 Vt. 490, 496. It is supported, finally, by the absence of persuasive affirmative evidence of a constitutional duty to assign.

If the bare historical record persuades that the Sixth Amendment contemplated the assignment of counsel, we think it clear that it does not persuade that assignment was contemplated without request. Even the English Treason Act of 1695,

⁹ These provisions are set forth in the Government's brief in *Walker v. Johnston*, No. 173, Appendix A, pp. 50-52.

which was to some extent copied by the Act of April 30, 1790, *supra*, p. 36, called for a request; and, except in Pennsylvania, those state courts which have pointed to their constitutions as well as to inconclusive statutes¹⁰ in finding a duty to assign, have explicitly required a request. See, *e. g.* *Weatherford v. State*, 76 Fla. 219; *Bethune v. State*, 26 Ala. App. 72, certiorari denied, 228 Ala. 422; *Holland v. Comm.*, 241 Ky. 813, 817; *State v. Satcher*, 124 La. 1015, 1019; *State v. Steelman*, 318 Mo. 628, 631-632; *State v. Raney*, 63 N. J. L. 363, 365; *Ex parte Rodriguez*, 118 Tex. Cr. App. 179, 181; *State v. Yoes*, 67 W. Va. 546, 547.

Most of the rights conferred by the Constitution must be claimed before they can be denied. The Court is not obliged to advise that the privilege against self-incrimination would justify a refusal to answer, even when the consequences of the answer are damaging indeed (see *Wilson v. United States*, 162 U. S. 613; *Powers v. United States*, 223 U. S. 303; *United States v. Block*, 88 F. (2d) 618 (C. C. A. 2d)) or that the accused has a right to a speedy trial (*Worthington v. United States*, 1 F. (2d) 154 (C. C. A. 7th); *Phillips v. United States*, 201 Fed. 259 (C. C. A. 8th)).

¹⁰ In only a minority of the states do the statutes specifically provide that when a defendant appears for arraignment, he must be advised that it is his right to be assisted by counsel. American Law Institute, Code of Criminal Procedure, Official Draft (1930) 630.

We think that the framers did not doubt that if men were granted rights by the organic law they would have the wit and the fortitude to assert them. The thought that more may sometimes be needed to bring potential rights to the fruition of enjoyment, while the basis of much modern legislation, is not a product of the Eighteenth Century.

Fourth: In our view the decisions of this Court go beyond the historical record and imply that the Sixth Amendment imposes a duty to assign counsel. But we do not think that it imposes such a duty in the absence of a request or of other circumstances which serve the function of a request in pointing to an actual need. Such circumstances may well be thought to exist in any case in which the defendant asserts his innocence and is required to stand trial without the assistance of counsel. But they do not exist where, as in the case at bar, the defendant, upon arraignment, pleads guilty to charges of which he is fully informed and is sentenced by a court which, presumably, was satisfied that his plea was voluntarily made.

The distinction between a trial and a plea of guilty as evidence of the need for counsel is the implicit basis of the many decisions since *Johnson v. Zerbst* which treat a voluntary plea of guilty, made without requesting counsel, as a waiver of the right (See, e. g., *Cundiff v. Nicholson*, 107 F. (2d) 162 (C. C. A. 4th); *Cooke v. Swope*, 28 F. Supp. 492

(W. D. Wash.), affirmed, 109 F. (2d) 955 (C. C. A. 9th); *Williams v. Sanford*, 110 F. (2d) 526 (C. C. A. 5th), certiorari denied, 310 U. S. 643).¹¹ We think the conclusion of these decisions is sound, though we prefer to state the result as a qualification of the right rather than its legal equivalent—the implication of a waiver as a matter of law. The distinction has also been supported by emphasizing that it is “for his defence” that the Constitution guarantees the right to counsel; and a defendant who pleads guilty desires to make no defense. See *Cooke v. Swope*, 28 F. Supp. 492, *supra*; *Parker v. Johnson*, 29 F. Supp. 829, 830 (N. D. Cal.); *State v. Murphy*, 87 N. J. L. 515, 530; *State v. Hoyer*, 89 N. J. L. 187. In Pennsylvania, the decisions requiring the accused to be advised of his right to counsel—in spite of the absence of a statute so providing (*Commonwealth v. Cohen*, 123 Pa. Super. 5; *Commonwealth v. Valerio*, 118 Pa. Super. 34)—have recently been held inapplicable to a defendant who pleads guilty. *Commonwealth ex rel. Curtis v. Ashe*, 139 Pa. Super. 417; *Commonwealth ex rel. Campbell v. Ashe*, 15 Atl. (2d) 409. The

¹¹ Accord: *Harpin v. Johnston*, 109 F. (2d) 434 (C. C. A. 9th), certiorari denied, 310 U. S. 624; *Franzeen v. Johnston*, 111 F. (2d) 817, 820 (C. C. A. 9th); *Buckner v. Hudspeth*, 105 F. (2d) 396, 397 (C. C. A. 10th), certiorari denied, 308 U. S. 553; *McCoy v. Hudspeth*, 106 F. (2d) 810, 811 (C. C. A. 10th); *Wilson v. Hudspeth*, 106 F. (2d) 812, 813 (C. C. A. 10th); *Pers v. Hudspeth*, 110 F. (2d) 812, 813 (C. C. A. 10th); *Blood v. Hudspeth*, 113 F. (2d) 470, 471 (C. C. A. 10th); *Erwin v. Sanford*, 27 F. Supp. 892 (D. C. Ga.).

same distinction has been taken in other states in the application of the assignment statutes. See, e. g., *State v. Murphy*, *supra*; *State v. Heyer*, *supra*; *People v. Williams*, 225 Mich. 133. A trial judge does not accept a plea of guilty without assuring himself that it is voluntary and competent (*Kercheval v. United States*, 274 U. S. 220); and if the plea is involuntary or incompetent the Government conceded (*Frame v. Hudspeth*, 309 U. S. 632) that it can be set aside. See also *Sanders v. Allen*, 100 F. (2d) 717 (App. D. C.).

It is not alleged in the present case that the petitioner pleaded guilty without full understanding of the nature of the charge and the implications of the plea; and recitations in the minutes of sentence that he remained silent when asked if there was any cause why sentence should not be pronounced (R. 8)¹² carry assurance that the plea which the petition does not impeach was competently and voluntarily made.

B. The Remedy of Habeas Corpus

First: Even if the Sixth Amendment is interpreted, as petitioner contends, to require that all defendants have counsel upon arraignment or knowingly waive the right, we do not think it necessarily follows that whenever this has not occurred the judgment is void and is open to collateral attack.

¹² Cf. *Rea v. Richmond*, 39 D. L. R. 117, (1918); Stephen, *History of the Criminal Law of England*, I, 442.

The right to counsel is guaranteed because it meets a need, not for its own sake. Accordingly, we contend that it is not enough to show that the abstract right was denied; it must also be shown that the need existed which constitutes the justification of the right. Even upon direct appeal a challenge based upon denial of the constitutional right is not ordinarily tenable unless the appellant was prejudiced by the acts alleged to constitute the denial (see *e. g.* *Motes v. United States*, 178 U. S. 458, 474; *Snyder v. Massachusetts*, 291 U. S. 97, 122; *Louisville & Nashville R. R. Co. v. Finn*, 235 U. S. 601, 610). When the attack is collateral there is obviously stronger reason for requiring the showing to be made.

To make such a showing a petitioner must establish that he suffered from the lack of counsel either in choosing his own course or in presenting his case. Such prejudice may be readily presumed when, as in *Johnson v. Zerbst*, *supra*, a defendant without legal competence is forced to trial without aid.¹³ It may also be readily inferred when a re-

¹³ It may be added that the record in the *Johnson* case showed that the defendants were troubled by testimony at the trial that the money they were charged with passing was counterfeit, because they did not believe "an ordinary person not used to handling money any more than I was could tell it was counterfeit" (R. 47). The matter was settled by the United States Attorney choosing an expert witness unknown to the defendants who testified that the money was counterfeit (R. 46-47).

quest for counsel was denied, since a defendant who seeks the aid must usually have responded to a felt need. But it cannot be implied when a defendant understandingly pleads guilty to an indictment validly charging a serious offense, and certainly not when he is a man of mature age who has previously been convicted of crime. In such a case a conviction has not resulted from the defendant's "own ignorance of his legal and constitutional rights" (*Johnson v. Zerbst*, 304 U. S. at 465). Counsel "had they been assigned could have entered no other plea than that which he himself entered, if they had dealt honestly with him and with the court" (Parker, J. in *Cundiff v. Nicholson*, 107 F. (2d) 162, 164 (C. C. A. 5th)). It is true that the sentence was excessive insofar as sentence was imposed upon both counts of the indictment. But from that error the petitioner has not suffered and will not suffer since the sentence ~~can be~~ corrected on motion and, if it is not, habeas corpus will be available to him in due time (see pp. 24-27, *supra*). So far as the judgment as a whole is concerned the only significant complaint is that originally alleged in the petition—that petitioner did not know and was not told of his right to counsel. In our view this is wholly insufficient to render the judgment vulnerable on collateral attack. It might even be held insufficient on direct attack (see Rule II, 4 of the Criminal Appeals Rules; Cf. *United States v. Norris*, 281 U. S. 619).

Second: It may be objected that this Court said in *Johnson v. Zerbst*, *supra*, that denial of the constitutional right to counsel is a jurisdictional defect; and that regardless of questions of prejudice the judgment was void and habeas corpus is an available remedy. We do not think that the defect, if defect there was, is truly jurisdictional. If it were, the doctrine of *Johnson v. Zerbst* would lead to denying that those acquitted without counsel have "been validly acquitted and cannot be tried again" (Sibley, J., in *Sanford v. Robbins*, 115 F. (2d) 435 (C. C. A. 5th), No. 613, present Term, certiorari denied, March 10, 1941).

We submit that the proper analysis is that habeas corpus may be employed to remedy the injustice caused by the denial of a fundamental right when there is no other remedy to which the aggrieved party may fairly be held (Cf. *Mooney v. Holohan*, 294 U. S. 103; see also *Bowen v. Johnston*, 306 U. S. 19). To call the defect jurisdictional preserves the integrity of the ancient rule that habeas corpus tests only the jurisdiction. (Cf. *Harlan v. McGourin*, 218 U. S. 442; *Knewel v. Egan*, 268 U. S. 442.) But it involves substantive difficulties in the present situation which more than outweigh the advantages thus obtained. Moreover, even if the error must be regarded as jurisdictional for habeas corpus to be available, we contend that it is only jurisdictional when it results in substantial injury to the petitioner. It is not to be for-

gotten that the decision in *Johnson v. Zerbst* found its primary authority in cases involving a trial which is only a sham (*Moore v. Dempsey*, 261 U. S. 86; cf. *Frank v. Mangum*, 237 U. S. 309; *Mooney v. Holohan*, 294 U. S. 103). The recognized distinction between a trial which is unfair and one which is void¹⁴ indicates that the concept of jurisdictional defect is not impervious to differences of degree.

Third: That such consideration should have weight in determining the extent to which judgments of conviction should be subject to collateral attack is strikingly emphasized by the fact that in 1938 and 1939 more than 70,000 pleas of guilty were filed in federal courts and 38,000 for the year ending June 30, 1940. In 1938 more than 50,000 pleas of guilty were filed in the courts of 26 states,¹⁵ in many of which the defendants were not required under state law to be informed of the right to counsel. The Government agrees that the desirable practice is that provided by the statutes of some states requiring an offer to appoint counsel upon

¹⁴ Compare the memorandum of Mr. Justice Holmes denying application for habeas corpus in *Sacco and Vanzetti v. Massachusetts*, printed in *The Sacco-Vanzetti Case* (1929), V, pp. 5516-5517. See also L. Hand, J., dissenting, in *Craig v. Hecht*, 282 Fed. 138, 155 (C. C. A. 2d).

¹⁵ This data was made available to the Department by Dr. C. C. Van Vechter, Chief of the Census Bureau, Department of Commerce. The number of pleas in the federal courts for the fiscal year ending June 1940 is taken from Annual Report of the Director of the Administrative Office of the United States Courts (1940), p. 85.

arraignment, even on a plea of guilty.¹⁶ In March 1937 the Attorney General urged that counsel be appointed "in each case in which the defendant has not retained counsel, unless he expressly states that he wishes to conduct his own defense" (Circular No. 2946); and for several years legislation has been furthered to establish a system of public defenders.¹⁷ Such reforms can be achieved legislatively without the retroactivity of constitutional adjudication. If retroactivity is essential, the reforms will be achieved at a cost which may offset the gain.

3. THE PETITIONER'S TESTIMONY BEFORE THE UNITED STATES COMMISSIONER DID NOT STATE A PRIMA FACIE CASE

Petitioner argues (Brief p. 34) that in determining the sufficiency of his application for a writ of habeas corpus to require the issuance of the writ, his testimony before the United States Commissioner should be treated as an elaboration of his petition and traverse. Even if his testimony is thus treated as a set of supplementary allegations, we contend that it does not significantly strengthen the case.

First: The portion of his testimony upon which petitioner mainly relies is that relating to the statements which he claimed were made to him by two agents of the Federal Bureau of Investiga-

¹⁶ See, e. g., Minn. Gen. Stat. (1923) § 10667. But cf. *State v. McDonnell*, 165 Minn. 423, 426.

¹⁷ See Annual Report of the Attorney General (1940), pp. 7-8.

tion before his removal to North Dakota and while he was detained with other federal prisoners in Kansas City. It is urged (Brief, pp. 32, 42) that in this testimony petitioner averred that he was induced to plead guilty by false and coercive statements that he would be sentenced to eighty years in prison, if he did not, and to only ten years if he did. In our view, this is a gross distortion of the testimony. Petitioner did say that the agents had threatened him with eighty years and promised to help him get only ten. But on two (R. 38, 64) of the three occasions (see also R. 61) when he made this claim, he said that the condition of the threat was not his refusal to plead guilty but rather his refusal to consent to removal and to sign a statement acknowledging that he was "implicated" in the robbery charged. The conflict was called to his attention and the point made explicit at the close of his testimony when he was asked if the agents discussed his plea with him. He replied: "The discussion was about the statement I should sign for them" (R. 64). At no point did he testify that he was led to plead guilty because he had signed the statement, when his "real desire was to plead not guilty or at least to be advised by counsel as to his course" (*Walker v. Johnston*, No. 173, p. 7); the purpose of his testimony seems clearly to have been to *avoid* any inference from his statement (which was introduced in evidence) that he had expressly waived counsel,

rather than to adduce the threat and the promise as an independent ground for relief not advanced in the petition itself.

It is significant in this connection that the petitioner's testimony as a whole discloses him to be a man of intelligence, ready of expression and response, who had been arrested frequently in the past and had previously been convicted of a crime, after a trial in which he was represented by counsel. These additional circumstances warrant, at the least, a close reading of his testimony in determining whether it suffices to allege that he "was deceived or coerced by the prosecutor into entering a guilty plea" (*Walker v. Johnston, supra*).

Of even greater importance, however, than the proper interpretation of this testimony, is the fact that at the time of the alleged statements petitioner was represented by counsel, who had advised him to consent to removal. Both he and his counsel were acquainted with the charges in the indictment. It is true that he testified that he did not discuss the statements with his attorney or consult with him as to the plea which he should enter upon his arrival in North Dakota. We may assume that these claims, fantastic as they are upon their face, are to be treated as allegations which the petitioner is entitled to prove if he can. It nevertheless appears from his own testimony that he was then in a position to protect himself by obtaining the requisite legal advice, if he chose

to do so. We submit that this was enough to draw the sting from the asserted statements of the agents, even if those statements would otherwise be held to vitiate his guilty plea (cf. *Garrison v. Johnston*, 104 F. (2d) 128 (C. C. A. 9th), certiorari denied, 308 U. S. 553, 636; *Thompson v. King*, 107 F. (2d) 307 (C. C. A. 8th)). The issue may be tested by supposing that he had been represented by counsel at the time of his plea and that similarly deceptive or coercive statements had been made to him at that time. We doubt that the claim that two police officers had made such statements—but that he had not seen fit to disclose them to his counsel—would be held to entitle him to a writ of habeas corpus. Yet the case supposed would be stronger for relief than the case at bar.

In *Walker v. Johnston*, upon which the petitioner strongly relies, the alleged threat was by the prosecutor, it was made with particular reference to the prisoner's plea and the prisoner was not represented by counsel either at the time of the alleged threat or at any other time.

To avoid the force of petitioner's representation by counsel prior to his removal to North Dakota, he points to *Johnson v. Zerbst*, and the fact that the petitioners there had counsel upon the arraignment, though not upon the trial. The answer is wholly clear. In the *Johnson* case the defendants needed counsel to meet the new problems presented by a trial in which they sought to maintain

their innocence. It was of no assistance to them then that they had been represented by counsel at the earlier stage. In the present case, the crucial incident urged to support the petition—the alleged threat—occurred before the removal; and the petitioner was represented by counsel at that time.

The petitioner's failure to note this distinction reveals the weakness of an argument which stresses the presence or absence of isolated elements in the cases heretofore decided by this Court, rather than a rational principle which explains the significance which those elements may have. We submit that the principle is that a defendant who was not represented by counsel can challenge the judgment only if he can show that he requested counsel or that he was in need of aid; nothing appears in the present case—either in the papers or in the testimony—to indicate that either condition is met.

Second: Petitioner also points to his testimony (R. 51) that after he had pleaded guilty to the first count, the second count was read, he hesitated and the trial court "instructed that any one who was guilty of any part of it was guilty of all." It is argued (Brief p. 39) that this alleged statement by the court constituted erroneous legal advice, misleading petitioner into pleading guilty to both counts in the indictment. In reply we say again that petitioner has not suffered from the

double sentence and has an adequate remedy at hand. We see no force in the argument that the entire judgment should be held void because a part of it conflicts with what has since been accepted as the governing law.¹⁸ Moreover, both petitioner and his Kansas City attorney were informed of the contents of the indictment. That his attorney did not call the matter to his attention suggests, what is the fact, that at that time the statute was widely misread. We think it clear that this incident too is utterly insufficient to state a case of oppression.

II

ASSUMING THAT THE RULE TO SHOW CAUSE DEVELOPED MATERIAL ISSUES OF FACT, PETITIONER WAS DEPRIVED OF NO SUBSTANTIAL RIGHT BY THE PROCEDURE EMPLOYED TO RESOLVE THEM

After the petition, the return and the traverse had been filed, the District Court issued what purported to be a writ of habeas corpus returnable "before the United States Commissioner for the Northern District of California, Southern Division, at the Administration Building of the United States Penitentiary at Alcatraz" (R. 18). Peti-

¹⁸ At the time of the sentence, on October 13, 1936, neither *Durrett v. United States*, 107 F. (2d) 438 (C. C. A. 5th), nor *Hewitt v. United States*, 110 F. (2d) 1 (C. C. A. 8th), *supra*, p. 25, had been decided. The first reported decision under the statute (*United States v. Harris*, 26 F. Supp. 788 (S. D. Calif.)), sustained the validity of a double sentence.

tioner contends that this was not the traditional writ of habeas corpus to which he was entitled if his application stated a *prima facie* case; and that his rights were substantially infringed by not issuing a writ, in the usual form, returnable before a judge or the court. We submit that the contention is unsound.

1. THE PROCEDURE FOLLOWED BY THE DISTRICT COURT WAS EQUIVALENT TO A REFERENCE TO THE COMMISSIONER TO HEAR AND REPORT THE TESTIMONY, WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

We do not argue that a United States Commissioner is a "judge" of a District Court, authorized by the statute to issue or to dismiss writs of habeas corpus (Rev. Stat. Sec. 752, U. S. C., Title 28, Sec. 452). We do contend that in spite of the language of the writ returnable before the Commissioner commanding the respondent "then and there to do, submit and receive whatsoever the United States Commissioner shall then and there consider in that behalf" the function and effect of the procedure was to refer the issues developed on the rule to show cause to the Commissioner with direction to take and report the testimony to the District Court, with his findings of fact and conclusions of law. We argue further that this procedure deprived the petitioner of no substantial right and was within the power of the District Court.

First: That the Commissioner conceived the procedure as equivalent to a reference to find the

facts and report to the court is apparent not only from his report (R. 26) but also from his statement at the opening of the hearing that the "District Court referred [the issues] to me to take testimony" (R. 37). His conception was shared by the petitioner who replied to the Commissioner's opening statement: "I understand" (R. 37) and, seemingly, by the petitioner's counsel who made no objection and participated in the hearing throughout. The same view of the matter was obviously taken by the court which, after a hearing, approved the report (R. 66) and adopted its findings (R. 69), though not without examining the evidence and making an independent determination (R. 69).¹⁹

¹⁹ The order denying the application and discharging the writ (R. 66) recites that the "report of the United States Commissioner came on regularly this day to be heard," that there was no appearance for the petitioner and that it is ordered that "said Report of the Commissioners be and the same is hereby approved." The opinion subsequently rendered in denying leave to appeal *in forma pauperis* contains the following fuller statement (R. 68-69): "A full hearing was held at Alcatraz Penitentiary, and the report, findings and recommendation of the Commissioner are on file herein. After an examination of the transcript of the proceedings had at this hearing, the testimony of the petitioner, the evidence presented by the respondent and the record filed as a part of the return, this court determined that petitioner had failed to sustain the burden imposed on him of proving that he was deprived of his constitutional right to the assistance of counsel for his defense and that the evidence amply supported the finding of the Commissioner that the petitioner competently and intelligently waived his right to the assis-

Second: This mutual understanding of the nature of the procedure is in keeping with the historic practice of the federal courts for California. The reference of issues of fact arising in habeas corpus proceedings to a United States Commissioner to hear the evidence and report findings originated long ago as a response to the tremendous number of petitions filed in Chinese exclusion cases. The earliest record of it, so far as we know, is a minute order signed by Circuit Judge Sawyer, dated July 9, 1888, referring all cases in which a writ of habeas corpus is issued "by or on behalf of a Chinese passenger seeking to land from any vessel in a port of this District" to "S. C. Houghton, Esquire, a Commissioner of this Court, to hear the testimony, ascertain and determine and report to the Court the facts and conclusions of law, and such judgment, as in his opinion ought to be rendered in each case" and, in case of exception by either side to the findings and judgment, to "report for the consideration of the Court all the testimony in the case upon which his findings are based."²⁰ Decisions of the period refer to such references as "the established practice" of the District Court (see e. g. *Gee Fook Sing v.*

tance of counsel; and adopting and approving the report, findings and recommendation of said United States Commissioner, the writ was discharged."

²⁰ A copy of this order, certified by a Deputy Clerk of the District Court for the Northern District of California has been filed with the Clerk of this Court.

United States, 49 Fed. 146, 147 (C. C. A. 9th); *Lee Sing Far v. United States*, 94 Fed. 834 (C. C. A. 9th); *In re Jew Wong Loy*, 91 Fed. 240 (N. D. Calif.). We are not aware that it was ever questioned, though it was followed in at least two cases which reached this Court (cf. *Nishimura Ekiu v. United States*, 142 U. S. 651, 652, 656; *United States v. Ju Toy*, 198 U. S. 253, 264; see also *Tang Tun v. Edsell*, No. 45, October Term, 1911, Record p. 16).

In view of the standing order of reference it was obviously simpler to make the writ returnable before the Commissioner and this, we are advised, was done at that time. A rule of practice of the Circuit Court for the District of California, adopted September 7, 1904 (Rule 99) implicitly recognized this practice in the following provision:

When a writ of habeas corpus is issued in behalf of any person claiming the right to enter or land in the United States as a citizen thereof, the writ shall, unless otherwise ordered by the Court, direct that the custody of such person shall not be disturbed pending the determination of the proceedings under the writ, but the person having such alleged citizen in custody shall when required so to do, bring him before the Court or Commissioner for the purpose of giving evidence, or in order that he may be present during the actual trial of the issues arising upon the petition for the writ and the return thereto, and when his presence is

no longer required before the Court or Commissioner, he shall be immediately returned to the custody of the person so producing him.

The rule remained as Rule 100 of the Rules adopted October 22, 1907. In 1926, it became Rule 133 of the Rules of the United States District Court for the Northern District of California but was broadened in scope to apply to all cases when "a writ of habeas corpus is issued in behalf of any person in the custody of any officer of the United States or of this State." In this broader form it is now included in Rule 50 of the Rules of Practice adopted December 1, 1933 (Appendix, *infra*, p. 76).

It is apparent, therefore, that the federal courts in California have referred issues of fact to Commissioners in habeas corpus cases for more than fifty years and that the issuance of a writ returnable before a Commissioner is a traditional equivalent of such an order of reference.²¹ (Cf. *Grin v. Shine*, 187 U. S. 181.) The fairness of the equivalent can hardly be doubted in the present case where the writ was issued only after the issues had been fully developed on the rule to show cause,

²¹ That references may be made to Commissioners is clearly contemplated by the statute prescribing their compensation (Act of May 28, 1896, c. 252, 29 Stat. 184, U. S. C. Title 28, Sec. 597) which provides a fee of \$3 a day for attending to a reference in a litigated matter in a civil cause at law, in equity or in admiralty, in pursuance of an order of the Court.

indicating that the petitioner was not entitled to prevail without first establishing the facts.

2. A REFERENCE IS PERMISSIBLE IN HABEAS CORPUS PROCEEDINGS

First: Petitioner argues that the practice conflicts with three provisions of the habeas corpus statutes: (a) that the "person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention" (Rev. Stat. Sec. 757, U. S. C. Title 28, Sec. 457); (b) that "the person making the return shall at the same time bring the body of the party before the judge who granted the writ" (Rev. Stat. Sec. 758, U. S. C. Title 28, Sec. 458); and (c) that the "court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require" (Rev. Stat. Sec. 761, U. S. C. Title 28, Sec. 461).

(a) The first contention overlooks the fact that prior to the issuance of the writ returnable before the Commissioner, the respondent had made a return to the District Court in the form of an answer to the order to show cause. The answer contained everything which would have been included in the return had the writ issued upon the filing of the petition itself. To require a second return upon the issuance of the writ would involve a useless duplication and conflict with the basic assumptions

upon which the order to show cause procedure rests. On this issue, therefore, we think the decision in *Walker v. Johnston* affords the decisive reply.

(b) The same answer may be made to the second point, that the person making the return did not bring the body of the petitioner before the issuing judge. One of the purposes of the rule to show cause is to avoid "useless grant of the writ with consequent production of the prisoner" (*Walker v. Johnston, supra*, p. 5). The issues, as defined on the rule to show cause, clearly indicated that the petitioner was not entitled to be released on the face of the return. Accordingly, his physical production in court could have served no purpose other than to accord him the opportunity to testify before the issuing judge in support of the petition.²² Hence, the only real question is whether the habeas corpus statutes accord to a petitioner the right to have the evidence heard in the first instance by the

²² The traditional requirement that the prisoner be produced at the time of the return developed at a time when the return imported absolute verity and its sufficiency could be challenged only on its face. If the return was insufficient, the prisoner was entitled to be bailed or to be released; and his presence in court assured that the relief would be afforded at once (see *Institutes*, i, 55; *Commentaries*, iii, * 129 *et seq.*; Holdsworth, *History of English Law*, IX, 119-121). The reason for the requirement is obviously inapplicable when the proceedings on the rule to show cause have indicated that the petitioner is not entitled to his immediate discharge.

judge or court rather than by a master or referee.²³ If they do, we concede that "issues of fact emerging from the pleadings" on the rule to show cause must be "tried as required by the statute" (*Walker v. Johnston, supra*, p. 5). That, indeed, is the only qualification which the decision in the *Walker* case imposed on the use of the rule to show cause. If that requirement is met, the petitioner is amply protected by his production in court for discharge, if the writ is sustained.

(c) We do not think that the statutory command that the court "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments" precludes a reference by the court to a master to hear and report the testimony with his findings of fact and conclusions of the law—so long as the actual adjudication is made by the Court.

The question is whether the words "by hearing the testimony" must be construed in the literal sense or whether the testimony may be heard through the instrumentality of a master, with ultimate adjudication by the court upon an examination of the transcript and the findings con-

²³ This is the view reflected in Rule 59 of the Rules of Practice, Northern District of California (Appendix, *infra*, p. 76) which provides that "the person having such person in custody shall when required so to do, bring him before the Court or Commissioner for the purpose of giving evidence, or in order that he may be present during the actual trial of the issues arising upon the petition for the writ and return thereto. * * *

tained in the master's report. We think the language must be read with the tacit assumptions of the law as to what a "hearing" traditionally imports. The power and practice of equity courts to refer issues to a master with or without consent,²⁴ the power of courts of law to appoint auditors and to accord to their reports the maximum scope permitted by the Seventh Amendment (*Ex parte Peterson*, 253 U. S. 300; see also *Heckers v. Fowler*, 2 Wall. 123), the practice of this Court in cases within its original jurisdiction,²⁵ the broad definition in Rule 53 of the Rules of Civil Procedure of the power to appoint a master in actions formerly legal as well as equitable—all combine to refute the contention that a court does not hear and determine because it refers the issue to an inferior officer to take and

²⁴ See *Kimberly v. Arms*, 129 U. S. 512, 525; *Crawford v. Neal*, 144 U. S. 585, 596; *Davis v. Schwartz*, 155 U. S. 631, 637; *Ex parte Peterson*, 253 U. S. 300, 312-313; Equity Rule 74 (1912); Rule 59 (1928); cf. Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 Harv. L. Rev. 483, 486-488. The power has been exercised in cases tried by a three-judge court under Judicial Code Sec. 266, in spite of the command of the statute that the application shall be "heard and determined by three judges" (*Atlantic Coast Line v. Florida*, 295 U. S. 301, 308).

²⁵ See e. g. *Texas v. Florida*, 306 U. S. 398; *New Jersey v. Delaware*, 291 U. S. 361. In *United States v. Shipp*, 214 U. S. 386, a proceeding to punish for contempt, this Court appointed a commissioner to take the testimony and report, without findings or conclusions of law. Upon the basis of the testimony reported, adjudications of contempt were made.

report the testimony, with findings of fact and conclusions of law.

The equity practice is peculiarly persuasive in the present context because in England—at least since the Habeas Corpus Act (31 Car. II, c. 2)—the writ of habeas corpus issued out of chancery as well as the law courts (cf. *People ex rel. Woodbury v. Hendrick*, 215 N. Y. 339, 346). The analogy of equity has been observed by this Court, which has said, referring to the summary inquiry authorized by the statute: “All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in *habeas corpus*” (*Storti v. Massachusetts*, 183 U. S. 138, 143; see also *Ex parte Royall*, 117 U. S. 241, 251). Indeed, if a reference were impossible under the statute, it is difficult to see how this Court could ever practically exercise its power to issue an original writ of habeas corpus if issues of fact were involved. The mandate of the statute “is applicable to this Court whether it is exercising its original or appellate jurisdiction” (*Storti v. Massachusetts, supra*).

The compatibility of a reference with the habeas corpus statutes is also sustained by the long-standing federal practice in California, referred to above,²⁶ which has been followed to some extent in

²⁶ In addition to the authorities cited, *supra*, pp. 53–54, see *In re Can-Pon*, 168 Fed. 479 (C. C. A. 9th); *In re Tsu Tse Mee*, 81 Fed. 702 (N. D. Calif.).

other federal courts.²⁷ There is at least one English precedent, and prior to the federal statute, for ordering a reference (*The Case of the Hottentot Venus*, 13 East 194); the practice of taking the verdict of a jury appears to be more common. (*In the Matter of Andrews*, 8 Q. B. 153, 160; *Re Guerin*, 60 L. T. 538, 542n.; *Re Gibson*, 15 Ont. L. R. 245, 247; see *In re Hakewill*, 12 C. B. 223, 228.) Both practices have been followed in the State courts, especially, though not exclusively, in infant custody cases.²⁸ Neither has been regarded as detracting from a judicial inquiry into the facts or the function of a habeas corpus hearing.

Nor is it decisive against a reference on habeas corpus, as petitioner argues, that personal liberty is involved. We do not deny that it is preferable when issues of credibility are presented to have

²⁷ See *Ex parte Sharp*, 33 F. Supp. 464 (D. Kan.); *United States ex rel. Ng Wing v. Brough*, 15 F. (2d) 377, 378 (C. C. A. 2d); *United States v. Corsi*, 55 F. (2d) 360 (S. D. N. Y.), *aff'd* 64 F. (2d) 1022 (C. C. A. 2d); *United States v. Dunton*, 288 Fed. 959 (S. D. N. Y.); *United States ex rel. Fong On v. Day*, 39 F. (2d) 202 (S. D. N. Y.), reversed on other grounds, 54 F. (2d) 990 (C. C. A. 2d). Cf. *King v. McLean Asylum of Massachusetts General Hospital*, 64 Fed. 331 (C. C. A. 1st).

²⁸ See *Ex parte Mooney*, 10 Cal. (2d) 1, 15; *Respublica v. Gaoler*, 2 Yeates (Pa.) 258; *Graham v. Graham*, 1 Serg. & R. 330; *People ex rel. Woodbury v. Hendrick*, 215 N. Y. 339; *People ex rel. Keator v. Moss*, 6 App. Div. 414, 419; *Matter of Mather*, 140 App. Div. 478; *Matter of Meyer*, 146 App. Div. 626; *People ex rel. Jones v. Johnson*, 205 App. Div. 190; *Joseph v. Puryer*, 273 S. W. 974 (Tex.); *Cooke v. Cooke*, 67 Utah 371; *Ex Parte Cannon*, 75 S. C. 214; *Ex parte Eagan*, 18 Fla. 194, 201. Contra: *State v. Farlee*, 1 N. J. L. 41.

the petitioner heard by the court. But it is another thing to hold that the statute requires this result by an unconditional command. The use of a master or commissioner is not precluded in other proceedings which may terminate in punishment, notably in the case of contempt (cf. *United States v. Shipp*, 214 U. S. 386). It is enough that the responsibility of ultimate adjudication is the court's (Cf. *Chin Bak Kan v. United States*, 186 U. S. 193, 200; *Ng Fung Ho v. White*, 259 U. S. 276, 279). Moreover, the argument assumes that a reference will obstruct the vindication of the right to freedom. We see no reason to assume that this is so (cf. *Ex. parte Sharp*, 33 F. Supp. 464 (D. Kan.)). The procedure of referring issues to a commissioner in the Northern District of California was devised for the purpose of eliminating the genuine obstruction of delay in the disposition of a multitude of petitions for habeas corpus (see ~~(cf. *Ex. parte Sharp*, 33 F. Supp. 464 (D. pp. 53, *supra*, 64, *infra*).~~

Second: If a reference is not incompatible with the hearing prescribed by the habeas corpus statute, we think it clear that the power to refer exists, as an aspect of the inherent power of federal courts "to provide themselves with appropriate instruments required for the performance of their duties (*Ex parte Peterson*, 253 U. S. 300,

312), a power broadly articulated in Rule 53 (a) of the Rules of Civil Procedure.²⁹

Petitioner contends that if Rule 53 (a) is applicable the reference was nevertheless improper because there was no "showing that some exceptional condition requires it", as provided by Rule 53 (b).

Even if the point were valid, we think it would be insignificant at this stage. There was no objection to the reference to the commissioner either at the hearing or in court.³⁰ Under these circumstances, it is certainly too late to challenge the action of the court on a matter peculiarly within

²⁹ Petitioner argues (Brief, p. 28) that Rule 53 is inapplicable, not only because a reference conflicts with the habeas corpus statutes—a contention which we have answered above—but also because the practice on habeas corpus has not, in this respect "heretofore conformed to the practice in actions at law or suits in equity" (Rule 81). We see no reason to doubt that the power before the Rules was as broad as that in equity; it was certainly broader than that at law since there is no right to a jury trial (*In re Neagle*, 135 U. S. 1, 75). Accordingly, if Rule 53 is inapplicable, we think the reason is that the *restrictions* of Rule 53 conflict with the flexibility implicit in the statutory mandate to proceed "in a summary way," not because Rule 53 would enlarge the procedural powers of a habeas corpus court. Cf. *White v. Johnston*, present Term, No. 697.

³⁰ It is doubtful also whether the point is included in the assignment of errors accompanying the petition for leave to appeal (R. 67, 74). If the first assignment, that the "Court erred in not issuing a writ of habeas corpus," can be read to attack the reference rather than the judgment, it plainly does not make the special point.

its discretion (see *Smith v. Brown*, 3 F. (2d) 926 (C. C. A. 5th); cf. *Eichberg v. United States Ship. Bd. Emer. Fleet Corp.*, 273 Fed. 886 (App. D. C.); *Coyner v. United States*, 103 F. (2d) 629, 635 (C. C. A. 7th); see also *Los Angeles Brush Manufacturing Corp. v. James*, 272 U. S. 701, 708). "We think that the parties should not be permitted to play fast and loose with the court, to speculate upon the chances of a favorable decision under the reference, and after final decision against them for the first time question the jurisdiction of the court to so act" (*Edwards v. La Dow*, 230 Fed. 378, 383 (C. C. A. 6th). Refusal to reverse the judgment on this ground is not "inconsistent with substantial justice" (Rule 61, Rules of Civil Procedure). In *McCullough v. Cosgrave*, 309 U. S. 634, the objection was timely and reversal avoided the reference.

Moreover, there is an "exceptional condition" well known to the District Court. From June 1, 1938 to April 1, 1941, there were 131 petitions for writs of habeas corpus filed in the Northern District of California by prisoners in Alcatraz Penitentiary, 75 based upon the decision in *Johnson v. Zerbst* and 3 upon the decision in *Walker v. Johnston*. Prisoners are sent to Alcatraz only if they are regarded as custodial problems, requiring maximum security. The hazards of escape are great and require unusual precautions for safe custody (see *Federal Offenders* (1938) p. 95; *ibid.*

(1939) p. 30; *Annual Report of the Attorney General* (1935 p. 151). These considerations constitute an "exceptional condition" and would, in our view, justify an order of reference. At the least, we do not see how it can be said that discretion was abused. Nothing in Rule 53 (b) indicates that the "exceptional condition" must appear of record when it is within the knowledge of the court.

3. THE PROCEDURE DID NOT OTHERWISE DEPRIVE THE PETITIONER
OF ANY SUBSTANTIAL RIGHT

Even if a reference was permissible, petitioner argues that there were other errors which require that the judgment be reversed.

First: It is urged that it was improper to hold the hearing before the Commissioner in the Administration Building of the Penitentiary at Alcatraz. We see no reason to believe that the place alone impaired the fairness of the hearing, which was conducted with scrupulous courtesy and respect for the petitioner's rights. The hearing was conducted by the Commissioner not by the officials of the prison. There is no support for the suggestion (Brief, p. 29) that the petitioner was handicapped by "the influence of his prison and warden" in any other sense than that he was a prisoner. That would have been no less true had the hearing been conducted across the bay. On the other hand, had it been conducted away from the prison, the custodial problem, to which we referred above, would obviously not have been met.

Second: It is urged that the court erred in making no findings of fact. We agree that findings are necessary (*White v. Johnston*, present Term, No. 697) but deny that they were not made. The Commissioner's findings were adequate; they support the judgment and are amply sustained by the evidence. This much, with a qualification noted below, the petitioner does not seriously dispute. The court approved the report and its opinion, which may be examined for this purpose (see *Babcock v. De Mott*, 160 Fed. 882 (C. C. A. 8th), certiorari denied, 212 U. S. 582), indicates that after an independent examination of the evidence it adopted the Commissioner's "findings and recommendation (R. 69). Rule 52 of the Rules of Civil Procedure, applicable in habeas corpus cases (*White v. Johnston, supra*) specifically provides that the "findings of a master, to the extent that the court adopts them shall be considered as the findings of the court" (see *United States v. Bethlehem Steel Corp.*, 26 F. Supp. 259, 261 (E. D. Pa.)).

Third: The return to the rule to show cause incorporated the "certificate" of the trial judge which recited that it was his invariable practice to inquire of prisoners appearing before him on felony charges whether they desired an attorney and, if so, to offer to appoint counsel; that he had no recollection of the petitioner's case but, in view of his practice and the length of the sentence, was certain that he made the inquiry before he permitted the plea to be entered. The Commissioner

summarized this certificate in his report (R. 29) in a section entitled "Evidence Presented By Respondent" (R. 28). In a section of the report entitled "The Law" (R. 31) he said: "Supporting affidavits are proper evidence in habeas corpus proceedings." Petitioner argues that the summary and the statement combined indicate that the Commissioner relied on the "certificate" as evidence to support the finding that the "Court in which sentence was imposed advised petitioner of his constitutional right to be represented by counsel" (R. 30), that the certificate was incompetent as evidence and that the error was perpetuated by the court in approving the report.

We think that the Commissioner's report is at least ambiguous as to whether he considered the certificate in evaluating the evidence. As the petitioner himself points out the certificate was not an affidavit and the questionable legal statement was limited to affidavits. The deposition of the United States Attorney who prosecuted the case, taken on notice, was introduced as evidence at the hearing (R. 19-22). It sufficed to sustain the finding as to the practice of the judge and the inference that the practice was followed in the particular case (cf. *Warszower v. United States*, No. 338, present Term, pp. 1-2). The "certificate", therefore, was cumulative at the most. Moreover, the opinion of the Court indicates, as we have said, that the findings of the Commissioner were approved after an independent examination of the evidence (R. 69);

the approval of the report certainly does not mean that every statement in it was followed by the court. In addition, the petitioner's own testimony was utterly implausible on the important point that he did not consult his attorney in Kansas City with regard to the plea he should enter or the alleged threats of the Government agents; it was inescapably evasive on the significant question of his familiarity with the indictment;³¹ it was explicitly rejected in the findings on the claim that his acknowledgment of guilt was involuntarily signed (Fdg. 5, R. 30). We see no reason why it should have been believed on the question of his knowledge of the right to counsel (Cf. *Quock Ting v. United States*, 140 U. S. 417; *Chin Yow v. United States*, 208 U. S. 8, 11-12). Under these circumstances, we contend that even if the certificate was considered, there is no significant probability that the consideration affected the result. There is the final point that the record does not show that any objection to the report was made³² (cf. *Home Land*

³¹ Upon direct examination he was asked by his attorney whether the indictment was read to him "by the Clerk of the court" when he appeared and entered his plea. He replied that it was not (R. 40). Upon cross-examination he admitted that the indictment was read at that time by the United States Attorney (R. 50) and had also been read to him by the United States Commissioner before his removal from Kansas City (R. 55).

³² We are advised that in fact petitioner's counsel did file a brief setting forth objections to the Commissioner's report. It was not urged that the certificate was inadmissible, though it was argued that the finding that petitioner was informed of his right should not be accepted on the evidence.

& *Cattle Co. v. McNamara*, 111 Fed. 822 (C. C. A. 9th), certiorari denied, 187 U. S. 642) or that error was assigned on this ground in the petition for leave to appeal. It can not be said that "substantial justice" requires a reversal on this ground (Rule 61, Rules of Civil Procedure).

Even if the finding that petitioner was informed of his right to counsel cannot be sustained in the present state of the record, it is enough to support the judgment that the findings explicitly reject the petitioner's testimony that his statement acknowledging his guilt was involuntarily signed (Fdg. 5, R. 30). The plain import of that finding is that petitioner's testimony that he was threatened was not believed or that the threats, if made, did not affect his behavior. Apart from the alleged claim of coercion, the petitioner's whole case would rest solely on the claim that he did not know and was not informed of his right to counsel. For the reasons set forth in Point I of this brief (pp. 28-45), he would not be entitled to relief even if he convinced the tribunal that such was the fact. Accordingly, it would not be ground for reversal of the judgment that the finding of an express waiver cannot be sustained.

Fourth: Petitioner contends, finally, that his rights were infringed because the procedure in the District Court denied him the opportunity to be heard on the approval of the Commissioner's report. Reliance is placed upon the statement in the petition for certiorari (on p. 3) that his at-

torney was never given notice that the writ of habeas corpus was denied. Reliance is also placed upon the statement in the petition for mandamus filed in the Circuit Court of Appeals on June 18, 1940, after the Commissioner's report had been filed in the District Court on May 23 (R. 26); that neither Judge Welsh nor the Commissioner had, to the petitioner's knowledge, taken steps to bring the proceedings in the District Court to a conclusion. But the record recites that on July 1, 1940, the report of the United States Commissioner "came on, regularly this day to be heard" (R. 66). It would be immaterial that the petitioner was not advised of the filing of the report on June 18, if he or his counsel was subsequently advised prior to July 1. In this state of the record, we see no occasion to assume that the failure of petitioner's counsel to appear at the hearing on the report (R. 66) was occasioned by his lack of notice. We are advised that, in fact, petitioner's counsel had notice and filed a "Brief in Opposition to Report of United States Commissioner," a copy of which has been filed with the Clerk of this Court. Moreover, it is significant in this connection that the only objection to the findings which the petitioner now urges, the claimed reliance upon the certificate of the trial judge, is not sufficient to alter the result. Were this Court itself to consider the evidence (*cf. Chicago, Milwaukee &c. Ry. v. Tompkins*, 176 U. S. 167, 179; *Denver v. Denver Union*

Water Co., 246 U. S. 178, 182; see also *Givens v. Zerbst*, 255 U. S. 11, 21; *Johnson v. Sayre*, 158 U. S. 109, 115-116), we submit that it would have no alternative but to find that it sustains the judgment below.

We do not deny that the delay in the disposition of the petitioner's application for a writ of habeas corpus is incompatible with the statutory command that such applications shall be promptly determined. The delay which has already occurred is, however, irremediable. The judgment ought not to be reversed unless the petitioner's rights have been infringed in some other substantial respect. We do not think that such is the case.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should not be disturbed.

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APRIL, 1941.

APPENDIX

Constitution of the United States, Sixth Amendment:

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Act of May 18, 1934, c. 304, Sec. 3, 48 Stat. 783
(U. S. C.; Title 12, Section 588b):

§ 588b. *Robbery of bank; assault in committing or attempting to commit bank robbery.* (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than \$1,000 nor more than \$10,000 or imprisoned not less

than five years nor more than twenty-five years, or both.

§ 588c. *Same; killing or kidnapping as incident to robbery.* Whoever, in committing any offense defined in section 588b of this title, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct.

Revised Statutes, Section 754, U. S. C. Title 28, Sec. 454.

Application for; complaint in writing. Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

Revised Statutes, Section 755, U. S. C. Title 28, Sec. 455.

Allowance and direction. The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

Revised Statutes, Section 756, U. S. C. Title 28,
Sec. 456.

Time of return. Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.

Revised Statutes, Section 757, U. S. C. Title 28,
Sec. 457.

Form of return. The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

Revised Statutes, Section 758, U. S. C. Title 28,
Sec. 458.

Body to be produced. The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

Revised Statutes, Section 759, U. S. C. Title 28,
Sec. 459.

Day for hearing. When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.

Revised Statutes, Section 760, U. S. C. Title 28,
Sec. 460.

Denial of return; counter allegations; amendments. The petitioner or the party imprisoned or restrained may deny any of

the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

Revised Statutes, Section 761, U. S. C. Title 28, Sec. 461.

Summary hearing; disposition of party.
The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

* * * * *

Rules of Civil Procedure, Rule 53, insofar as material provides:

(a) **APPOINTMENT AND COMPENSATION.**—Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. * * *

(b) **REFERENCE.**—A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

* * * * *

(e) REPORT.

1. *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

* * * * *

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Rule 50 of the Rules of Practice of the District Court of the Northern District of California in so far as material provides:

When a writ of *habeas corpus* is issued in behalf of any person in the custody of any officer of the United States or of this State, the writ shall, unless otherwise ordered by the Court, direct that the custody of such person shall not be disturbed pending the determination of the proceedings under the writ, but the person having such person in

custody shall, when required so to do, bring him before the Court or Commissioner for the purpose of giving evidence, or in order that he may be present during the actual trial of the issues arising upon the petition for the writ and return thereto, and when his presence is no longer required before the Court or Commissioner, he shall be immediately returned to the custody of the person so producing him.

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practice of inquiring of prisoners charged with felony whether they wanted counsel and his firm belief that he so inquired of the petitioner, and the affidavit of a deputy marshal to the effect that petitioner said he did not desire counsel.

Petitioner filed a traverse in which he denied that the trial judge had interrogated him as stated and denied that he had made the alleged statement to the deputy marshal. The district judge issued a writ commanding the respondent to produce the petitioner before a commissioner of the District Court at the Alcatraz prison on a day named. This was done and the commissioner there took the petitioner's testimony and later received the depositions of two witnesses on behalf of the respondent. The commissioner submitted a report in which he recited his proceedings, summarized the asserted grounds for relief, made findings of fact, stated conclusions of law, and recommended that the application be denied. After hearing argument on the report the judge entered an order discharging the writ.

The petitioner applied for leave to appeal *in forma pauperis*. This was denied by an order which recited that, so far as the petition was based on the alleged invalidity of the sentence on the second count of the indictment it was premature and, so far as it was grounded on the deprivation of the assistance of counsel, the evidence sustained the finding of the commissioner that the petitioner had competently and intelligently waived his right to such assistance. Accordingly, the judge denied an appeal for want of merit in the application.

The petitioner moved the Circuit Court of Appeals for leave to appeal *in forma pauperis*, which was denied. He then petitioned this Court for certiorari² and for leave to proceed *in forma pauperis*. Both petitions were granted and counsel was appointed to represent him in this Court.

The burden of petitioner's complaint is that the procedure adopted by the District Court,—that of a hearing before a commissioner and the disposition of the cause on the record made before him—is a plain violation of the Acts of Congress regulating the practice in *habeas corpus* cases. In addition, he seeks a reversal of the judgment on the ground that the sentence on the

² We have jurisdiction under § 262 of the Judicial Code, 28 U. S. C. § 377; In re 620 Church Street Corporation, 299 U. S. 24.

second count is void. He insists that he is entitled to a decision to this effect so that he may apply for parole under the sentence imposed on the first count.

The respondent argues that we need not consider the question of the regularity of the hearing in *habeas corpus* since the petition should have been denied as premature so far as it rested on the asserted illegality of the sentence and since the District Court should have dismissed the petition for insufficiency of the allegations concerning the denial of assistance of counsel.

1. The respondent admits that § 2 of the Act of May 18, 1934, *supra*, does not create two separate crimes but prescribes alternative sentences for the same crime depending upon the manner of its perpetration. This concession, however, does not aid the petitioner. The erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy. And if, as the petitioner contends, the first sentence of ten years is valid and the second void, he is no better off. Conceding, without deciding, that he is right in saying the first sentence is the only valid one, he has not served that sentence and is not entitled now to be discharged from custody under it. He urges that if the second sentence is adjudged void he will now be entitled to apply for parole under the first. But we have recently decided that *habeas corpus* cannot be awarded to afford a prisoner such an opportunity.³ His remedy is to apply for vacation of the sentence and a resentence in conformity to the statute under which he was adjudged guilty.

2. The respondent's contention that we should affirm the judgment because the petition for the writ insufficiently alleges a denial of constitutional right and fails to rebut the presumption of regularity which attaches to the record of petitioner's trial and conviction may be shortly answered. A petition for *habeas corpus* ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice. In the present instance, moreover, the judge, by calling on the respondent to show cause, adjudged that, in his view, the petition was sufficient and, by referring the cause to a master,

³ *McNally v. Hill*, 293 U. S. 131.

evinced a judgment that the petition, the return, and the traverse made issues of fact justifying the taking of evidence. These decisions did not constitute an abuse of discretion and we will not review them.

"The respondent insists that the petition was premature if the petitioner's claim that he was denied the assistance of counsel is without merit, but the contention is pressed only if we find that no question as to such denial is presented."

void, nevertheless, the denial of petitioner's constitutional right would rob either sentence of validity.

4. We come then to the serious question in the case. Was the method of trial of the fact issues presented by the pleadings in accordance with law?

Revised Statutes §§ 757, 758, and 761⁴ prescribe the procedure to be followed. The first requires that "The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party"; and the second that: "The person making the return shall at the same time bring the body of the party before the judge who granted the writ." The third provides that: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require".

It is plain, as the respondent concedes, that a commissioner is not a judge and that the command of the court's writ that the petitioner appear before that officer was not a literal compliance with the statute. The respondent argues, however, that the writ in effect referred the cause to the commissioner as a master whose function was to take the testimony and submit it, together with his findings and conclusions, for such action as the court might take

⁴ 28 U. S. C. §§ 457, 458, 461.

⁵ Both these sections are derived from the *Habeas Corpus* Act of February 5, 1867, c. 28; 14 Stat. 385. In the codification the language of the original statute was altered to indicate that the return might be made to the court, justice, or judge, whereas, in the original statute, the provision is that the respondent "shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person" . . . 14 Stat. 386. Nothing in this case turns on the diversity between the language employed in the statute and that found in the revision.

upon such submission. The argument runs that this practice is in substance equivalent to a hearing before the judge in his proper person, has long been followed in the district courts in California, has not incurred the criticism of this Court in cases brought here where it was followed, is a convenient procedure, tends to expedite the disposition of such cases, is in accordance with long standing equity practice and is countenanced by Rule 53(a)(b) of the Rules of Civil Procedure.⁶

We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of *habeas corpus* in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done.⁷ The Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.

The circumstance that the practice has grown up of referring such causes to a commissioner, has long been indulged in in the federal courts of California, and has found a place in a rule of court, cannot overcome the plain command of the statute. It is true that the practice was followed in certain deportation cases which were reviewed by this Court but, so far as appears, no point was made as to the procedure followed in those cases and the matter was passed without notice.

It may be that the practice is a convenient one but, if so, that consideration is for Congress. In view of the plain terms in which the Congressional policy is evidenced in the *habeas corpus* act, the courts may not substitute another more convenient mode of trial.

⁶ 28 U. S. C. A. following § 723c.

⁷ *Johnson v. Zerbst*, 304 U. S. 458; *Walker v. Johnston*, No. 173, October Term, 1940.

It is said that the procedure tends to expedite the disposition of *habeas corpus* cases. The record in this case would seem to contradict the argument.⁸ And when it is remembered that R. S. 756⁹ required that the return in this case be made within three days of the issue of the writ, and that R. S. 758, *supra*, required the respondent to produce the body at the same time he made the return; that R. S. 759¹⁰ commands that the hearing shall be set not more than five days after the return; and that R. S. 761, *supra*, enjoins the judge to proceed in a summary way to hear the cause and dispose of the petitioner, it is difficult to see how the comparatively cumbersome and time consuming procedure of reference, report, and hearing upon the report, can be thought a more expeditious method than that prescribed by the statute.

The practice of referring equity causes to masters presents no persuasive analogy. The scope and purpose of the two proceedings are obviously different. Moreover, when Congress prescribed the procedure in *habeas corpus* the practice of reference to masters in chancery was well known to it. The legislature, nevertheless, saw fit to require a different procedure in *habeas corpus* cases.

Finally, the sanction by Rule 53 of the Rules of Civil Procedure of references to masters does not aid in the decision of the question presented.*

Rule 53 provides that appeals in *habeas corpus* cases are to be governed by the rules, but that the rules are not applicable "otherwise than on appeal" in *habeas corpus* cases "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity" Since the practice in *habeas corpus* is set forth in plain terms in the Revised Statutes to which reference has been made Rule 53 has no application.

⁸ The petition was filed May 8, 1939. The order to show cause issued June 29, 1939. The return was presented July 10, 1939; the traverse July 31, 1939. The writ issued December 14, 1939. The commissioner held hearings on December 16, 1939, and April 30, 1940. He filed his report May 23, 1940, and the judge entered an order confirming the report and discharging the writ July 1, 1940. No explanation is vouchsafed for what seems, in view of the peremptory terms of the statute, an inordinate protraction of the proceeding.

⁹ 28 U. S. C. § 456.

¹⁰ 28 U. S. C. § 459.

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In summary, we hold that the provisions of the *habeas corpus* act, as embodied in the Revised Statutes, are too plain to be disregarded for any of the reasons advanced. The District Judge should himself have heard the prisoner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings. The petitioner has not been afforded the right of testifying before the judge, which the statute plainly accords him. In order that he may have that right we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion. We express no opinion as to the weight or sufficiency of the evidence heretofore adduced. The issues of fact will be for solution by the District Court upon a further hearing.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.